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THE NEW MORAL TURPITUDE TEST: FAILING CHEVRON STEP ZERO

Mary Holper

ABSTRACT

*In the waning days of the Bush administration, Attorney General Michael Mukasey decided *In re Silva-Trevino*, in which he reversed over a century of immigration law precedent by creating a new moral turpitude test. He abandoned the well-entrenched “categorical approach,” the mechanism by which immigration judges decide whether a noncitizen is removable for a criminal conviction, and allowed judges to engage in a factual inquiry of whether an offense involves moral turpitude. The Attorney General made such a broad, sweeping change through a process that allowed no input from affected parties, including the individual whose case became the new precedent. In this article, I argue that courts should refuse deference to *Silva-Trevino* under “Chevron step zero.” *Chevron, U.S.A. Inc. v. NRDC* introduced a well-known two-step analysis for courts to determine whether an agency’s decision deserved deference: first, courts determine whether Congress used clear language in the statute; second, if Congress was not clear, courts defer to the agency’s reasonable interpretation. The Court later introduced what scholars call “Chevron step zero.” In an important step zero decision, the Court decided *United States v. Mead Corp.*, holding that courts should not defer to agency interpretations of law issued through informal procedures because such interpretations do not have the force of law. I argue that courts should not defer to *Silva-Trevino* under Chevron step zero because the Attorney General did not decide the case using law-like procedures: the decision-making process demonstrated neither transparency nor careful consideration.*

THE NEW MORAL TURPITUDE TEST: FAILING CHEVRON STEP ZERO

*Mary Holper**

INTRODUCTION

In the waning days of the Bush administration, Attorney General Michael Mukasey decided *In re Silva-Trevino*,¹ in which he reversed over a century of immigration law precedent by creating a new moral turpitude test. Attorney General Mukasey altered the “categorical approach,” which immigration judges use to decide whether a noncitizen is removable for a criminal conviction. Under the traditional categorical approach, immigration judges look only at the elements of the statute of conviction and, if necessary, the record of conviction, to determine whether the offense involved moral turpitude. The new moral turpitude test is a total overhaul of the categorical approach; it allows judges to look behind the record of conviction and engage in a factual inquiry, thus potentially subjecting many more noncitizens to removal for a crime involving moral turpitude.

The Attorney General’s broad, sweeping change to immigration law was not made through the notice-and-comment rulemaking process. Indeed, he did not even notify the parties to the adjudication that he was contemplating a reversal of years of precedent. Thus, parties had no opportunity to brief the issue; nor did outside groups have an opportunity to comment as *amici* until after the Attorney General already had published the decision. Rather, the decision was made at the eleventh hour of the Bush administration, once the election results determined that a Democratic administration would gain control of the Department of Justice two months later.

In this article, I argue that courts should refuse deference to *Silva-Trevino* notwithstanding the principles of deference embodied in the Supreme Court’s decision in *Chevron, U.S.A. Inc. v. NRDC*.² *Chevron* introduced a now well-known two-step analysis to determine whether an agency’s decision deserves deference: first, courts determine whether

* Associate Professor, Roger Williams University School of Law. I would like to thank Dan Kanstroom, Nancy Morawetz, Al Brophy, Peter Margulies, Carl Bogus, David Zlotnick, Jared Goldstein, Jonathan Guttoff, Ed Eberle, Rachel Rosenbloom, Erin Corcoran, Ben Krass and Sarah Sherman-Stokes for their valuable comments to drafts of this article. I also would like to thank all of the participants of the New England Junior Scholars Conference on July 22, 2010, for their thoughts and suggestions. Thanks also to Miles Uhde and Erin Paquette for their helpful research assistance.

¹ 24 I&N Dec. 687 (AG 2008).

² 467 U.S. 837 (1984).

Congress used clear statutory language; second, if Congress was not clear, courts defer to the agency's interpretation, so long as it is reasonable. The Court later introduced what scholars call "*Chevron* step zero – the initial inquiry into whether the *Chevron* framework applies at all."³ In an important step zero decision, the Court decided *United States v. Mead Corp.*,⁴ holding that courts should not defer to agency interpretations of law issued through informal procedures because such interpretations do not have the force of law. I argue that courts should not defer to *Silva-Trevino* under *Chevron* step zero because the Attorney General did not decide the case using law-like procedures: the decision-making process demonstrated neither transparency nor careful consideration.

In Part I, I describe the removal process for noncitizens and the categorical approach, the method by which immigration judges determine removability for a criminal conviction. I also describe the *Silva-Trevino* decision, in which the Attorney General rejected the traditional categorical approach for resolving whether an offense is a "crime involving moral turpitude." In addition, I discuss the secretive process by which the Attorney General rendered the decision in *Silva-Trevino*.

In Part II, I discuss different types of deference courts give to an agency's decision, including the light amount of deference under *Skidmore v. Swift & Co.*⁵ and heavy deference under *Chevron*. I focus on the Court's decision in *Mead*, in which the Court refused *Chevron* deference, but permitted *Skidmore* deference, to an agency decision that did not have the force of law because it was not the product of formal procedures.

In Part III, I argue that the Attorney General's decision in *Silva-Trevino* should not survive *Chevron* step zero because the decision-making process did not allow public input before significantly changing immigration law. As the process by which the Attorney General made his decision did not ensure transparency or careful consideration, the *Chevron* analysis should not apply, pursuant to the Court's decision in *Mead*. I also discuss whether the *Silva-Trevino* decision's binding effect and authoritative nature will lead courts to apply the *Chevron* analysis.

In Part IV, I propose solutions for both courts and the agency to grapple with the *Silva-Trevino* decision. As discussed in Part III, courts can refuse deference at *Chevron* step zero. Another solution is directed at the agency: Attorney General Holder can reconsider *Silva-Trevino* by vacating the decision and commencing rulemaking. He also can *sua sponte* reconsider the decision, but ask for briefing from affected parties before his

³ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 836 (2001).

⁴ 533 U.S. 218 (2001).

⁵ 323 U.S. 134 (1944).

final decision. Either rulemaking or a more participatory adjudication would cure the process problems, allowing for public input that ensures transparency and careful consideration by the agency.

I. THE NEW MORAL TURPITUDE TEST IN CONTEXT

A. *From Arrest to Removal*

Juan's story illustrates the process by which a noncitizen journeys from the criminal justice system through the deportation system.⁶ Years after the completion of his sentence for larceny, during a traffic stop, the police officer contacts the Immigration and Customs Enforcement agency ("ICE"), a subagency of the Department of Homeland Security ("DHS"),⁷ who takes Juan into custody.⁸ A trial attorney who works for DHS files a charging document called a "Notice to Appear" in immigration court, thus commencing removal proceedings.⁹ The Notice to Appear charges Juan with a violation of the Immigration and Nationality Act ("INA"),¹⁰ for example, a conviction for a "crime involving moral turpitude" ("CIMT").¹¹

The immigration judge, an employee of the Executive Office for Immigration Review ("EOIR") within the Department of Justice, decides Juan's case.¹² She first decides whether he is removable for such offense, i.e., whether he has been "convicted," and, if so, whether his offense is a

⁶ Juan's story is not a true story; however, it is based on sets of facts from different clients the author has represented.

⁷ The Department of Homeland Security, which Congress created in 2002 by passing the Homeland Security Act, absorbed most of the immigration functions of the former Immigration and Naturalization Service, including the enforcement of immigration laws. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; 6 U.S.C. § 251. ICE became responsible for detention, removal and investigations. See *id.*; "About ICE," available at <http://www.ice.gov/about/index.htm>.

⁸ See 8 U.S.C. § 1357(a)(2) ; 8 C.F.R. § 287.5(c). This type of cooperation between states and ICE is facilitated by 8 U.S.C. § 1357(g), under which ICE may enter into written agreements with states or localities in which state or local officers, with proper training, acts as ICE agents. 8 U.S.C. § 1357(g)(1), (2). Currently, ICE has these types of agreements with seventy-one law enforcement agencies in twenty-six states. Immigration and Customs Enforcement, "287(g) Results and Participating Entities," available at http://www.ice.gov/pi/news/factsheets/section287_g.htm.

⁹ See 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(c). The 1996 reforms to the Immigration and Nationality Act discontinued the use of the term "deportation" and replaced it with "removal."

¹⁰ 8 C.F.R. § 1003.15(b).

¹¹ See 8 U.S.C. § 1227(a)(2)(A)(i).

¹² See 8 C.F.R. §§ 1003.0, 1003.12.

CIMT.¹³ If the judge finds Juan removable, he may apply for any relief from removal for which he is eligible.¹⁴ At a later hearing, the judge decides whether Juan merits that relief; she makes this decision after a trial-like hearing in which both Juan and the DHS trial attorney may present evidence.¹⁵ At the conclusion of this hearing, the judge decides whether Juan will be deported or remain in the U.S.¹⁶ The two parts of a removal proceeding can be likened to a criminal trial: first the judge determines whether Juan is “guilty” (deportable); if so, she decides his “sentence” (if she grants him relief from removal, he stays in the U.S.).¹⁷

Either Juan or the DHS trial attorney may appeal to the Board of Immigration Appeals (“BIA”), a fourteen-member body¹⁸ that sits within EOIR and decides appeals of immigration judges nation-wide.¹⁹ At any point of this process, the Attorney General (“AG”) may vacate an

¹³ The process by which the judge determines whether a state offense is a CIMT is discussed more in Part IB, *infra*.

¹⁴ One common example of relief from removal is cancellation of removal, which is a discretionary waiver for long-term permanent residents who have been convicted of a removable offense, where Juan must show that he has been a lawful permanent resident for at least five years, has resided continuously in the U.S. for at least seven years, and has not been convicted of an “aggravated felony.” 8 U.S.C. § 1229b(a). Other forms of relief include adjustment of status (= application for a greencard), *see, e.g.*, 8 U.S.C. § 1255; asylum, *see* 8 U.S.C. § 1158(a); withholding of removal under 8 U.S.C. § 1231(b)(3) (which requires the applicant to show a 51% likelihood of persecution if removed, *see* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987); *INS v. Stevic*, 467 U.S. 407, 423-24 (1984)); and withholding or deferral of removal under the Convention Against Torture (which requires the applicant to show a 51% likelihood that his government will torture him if he is removed, *see* 8 C.F.R. §§ 208.16-18).

¹⁵ *See, e.g.*, 8 U.S.C. § 1229a.

¹⁶ *See* 8 C.F.R. § 1003.37.

¹⁷ One form of relief, voluntary departure, would not allow Juan to stay in the U.S. Voluntary departure allows Juan to leave voluntarily, without the consequences of a removal order. *See* 8 U.S.C. § 1229c; *see also* 8 U.S.C. § 1182(a)(9)(A)(ii) (stating that a noncitizen who has an order of removal is inadmissible for 10 years after the date of removal).

¹⁸ The BIA is authorized up to fifteen members, although there are currently fourteen. 8 C.F.R. § 1003.1(a)(1); EOIR Fact Sheet: Board of Immigration Appeals Biographical Information (August 2009), available at <http://www.justice.gov/eoir/fs/biabios.htm>.

¹⁹ *See* 8 C.F.R. § 1003.1(b). The American Bar Association (“ABA”) recently addressed the problems inherent in the current system, in which immigration judges and the BIA lack independence because they are located within an executive branch agency responsible for law enforcement; other problems with the system include inefficiency and perceptions that the system is both unfair and that judges lack professionalism. *See* ABA Commission on Immigration, “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases,” Executive Summary, 43-48 (2010). The ABA proposed a restructuring of the current system, either by converting the judges and BIA into Article I judges or, in the alternative, creating an independent agency to adjudicate immigration cases. *See id.* at 48.

immigration judge's or BIA panel's decision and certify an issue to him or herself.²⁰ Once Juan has a final order of removal, either issued by the BIA or AG, he may appeal to the circuit court in which the immigration judge completed proceedings.²¹ On appeal, arguing against Juan is an attorney from the Office of Immigration Litigation ("OIL") of the Department of Justice civil division.²² Circuit courts may hear issues of law or constitutional issues in immigration cases, as opposed to pure questions of discretion.²³ In Juan's case, this means that a circuit court will more likely hear whether his offense is a CIMT (a question of law), as opposed to whether he merits relief from removal in the exercise of discretion.²⁴

B. The Categorical Approach

Juan was not convicted under a state statute named "the offense of moral turpitude." How does the immigration judge determine whether he was convicted for a CIMT? The INA does not define CIMT in the same way that it defines, for example, what is an aggravated felony.²⁵ Judges must rely on precedent decisions by the BIA and federal courts that define the term; for example, convictions involving fraud,²⁶ theft²⁷ and serious bodily injury²⁸ all have been held to be CIMTs.

²⁰ See 8 C.F.R. § 1003.1(h)(i).

²¹ See 8 U.S.C. § 1252(b)(2).

²² While DOJ civil division attorneys usually are generalists, OIL focuses exclusively on immigration cases. See Margaret Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L. J. 271, 293 n.122 (2002); 28 C.F.R. § 0.45(k); see also Michael Herz and Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345-49 (2000) (discussing that some agencies can litigate on their own behalf while others are represented by the Department of Justice).

²³ 8 U.S.C. § 1252(a)(2)(B), (D). Scholars have discussed the difficulty of separating issues of law from issues of discretion. See, e.g., Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

²⁴ See 8 U.S.C. § 1252(a)(2)(B), (D).

²⁵ See, e.g., 8 U.S.C. § 1101(a)(43) (defining twenty-one different categories of offenses that are aggravated felonies); see also *Abdelqadar v. Gonzales*, 413 F.3d 668, 671-72 (7th Cir. 2005) (" '[A]ggravated felony' is a defined term, while 'crime involving moral turpitude' is not."). The term CIMT has been challenged as void for vagueness, but the term withstood that challenge in *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

²⁶ See *Jordan*, 341 U.S. at 227; *In re Flores*, 17 I&N Dec. 225, 228 (BIA 1980).

²⁷ A theft offense that punishes a defendant for permanently, as opposed to temporarily, depriving the owner of the rights and benefits of ownership is a crime involving moral turpitude. See *In re D-*, 1 I&N Dec. 143, 144-45 (BIA 1941).

²⁸ See *In re Sejas*, 24 I&N Dec. 236 (BIA 2007); *In re Fualaau*, 21 I&N Dec. 475 (BIA 1996).

Dating back to when “moral turpitude” first appeared in the immigration laws,²⁹ courts have preferred an elements-based analysis to determine whether an offense involves moral turpitude.³⁰ This analysis requires a judge to determine the elements of the criminal offense, i.e., the minimum acts that the prosecution must prove beyond reasonable doubt in order for the jury to convict.³¹ If the minimum conduct does not involve moral turpitude, an adjudicator cannot consider the underlying facts that led to the conviction.³² This approach, commonly called the “categorical approach,” later became the method by which immigration judges determined removability for firearms offenses, aggravated felony convictions and all other criminal grounds of removability.³³

The elements of a particular offense do not always line up neatly with the elements of the ground of removability.³⁴ State statutes can be multi-sectional or disjunctive; often there are elements of the offense that fit within the removability ground and elements that do not. When a noncitizen has been convicted under such a statute, which is called a “divisible” statute, immigration judges consult the record of conviction to determine the nature of the conviction.³⁵ The record of conviction is limited to the documents upon which the jury relied to convict: the charging document and jury instructions.³⁶ In the case of a plea, the plea agreement

²⁹ The term “moral turpitude” first appeared in the immigration laws in 1891; the Act of March 3, 1891, excluded from the U.S. the following persons:

All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous or contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes...

Act of March 3, 1891, Ch. 551 (Fifty-first Congress, Sess. II).

³⁰ See *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914). For a longer discussion of this elements-based analysis, see Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 979-80 (July 2008).

³¹ See *In re Winship*, 397 U.S. 358, 363 (1970).

³² See *Mylius*, 201 F. at 863.

³³ See, e.g., *In re Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008) (using categorical approach to determine removability for a crime of child abuse pursuant to 8 U.S.C. § 1227(a)(2)(E)(i)); *In re Pichardo-Sufren*, 21 I&N Dec. 330, 334 (BIA 1996) (using categorical approach to determine removability for a firearms offense pursuant to former 8 U.S.C. § 1251(a)(2)(B)(i)); *In re Alcantar*, 20 I&N Dec. 801, 810 (BIA 1994) (using categorical approach to determine removability for an aggravated felony pursuant to former 8 U.S.C. § 1251(a)(2)(A)(iii)).

³⁴ See *Dulal-Whiteway v. DHS*, 501 F.3d 116, 128 (2d Cir. 2007).

³⁵ See *Pichardo-Sufren*, 21 I&N Dec. at 334.

³⁶ See *In re Milian-Dubon*, 25 I&N Dec. 197, 199 (BIA 2010).

is also part of the record of conviction.³⁷ Documents such as the police report do not form the basis of the facts presented to the jury; this document provides one person's version of the facts leading to the conviction.³⁸ Thus, the facts leading up to a conviction – what happened on the street – do not matter to an immigration judge.³⁹ Using the categorical approach, the judge may only consider the elements of the criminal statute and, if necessary, the documents contained in the record of conviction.⁴⁰

³⁷ See *id.* (citing *Shepard v. U.S.*, 544 U.S. 13, 16, 26 (2005)).

³⁸ See *In re Teixeira*, 21 I&N Dec. 316, 320 (BIA 1996). This consideration of the record of conviction is commonly called the “modified categorical approach.” See, e.g., *Dulal-Whiteway*, 501 F.3d at 122. For the purposes of this article, I will refer to both the categorical and the modified categorical approach collectively as the “categorical approach.”

³⁹ See *In re Torres-Varela*, 23 I&N Dec. 78, 84 (BIA 2001) (“The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed.”).

⁴⁰ The development of the categorical approach in immigration law has been influenced by the categorical approach used in the criminal sentencing context. See *Taylor v. United States*, 495 U.S. 575, 581 (1990) (determining whether a state burglary conviction was a predicate burglary offense under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), in order to enhance the defendant’s sentence for being a “career” criminal and holding that if the statute of prior conviction was broader than the generic burglary statute, the sentencing court only could look to the documents upon which the jury relied to convict, such as the charging paper and jury instructions); see also *Shepard*, 544 U.S. at 19 (applying *Taylor*’s reasoning to prior convictions that were based on plea agreements). Many of the reasons for the use of the categorical approach in immigration cases track the reasons for its use in the criminal sentencing context. Like the sentencing statute, most of the criminal removal grounds are premised on a “conviction.” See *Taylor*, 495 U.S. at 600; *Dulal-Whiteway*, 501 F.3d at 125 (reasoning that the use of the word “conviction” in the sentencing and removal contexts are analogous and thus the categorical approach as used in *Taylor* is the appropriate approach for criminal removal cases); *Velazquez-Herrera*, 24 I&N Dec. at 513 (“[W]here a ground of deportability is premised on the existence of a ‘conviction’...the focus of the immigration authorities must be on the crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed.”). In addition, immigration judges, like sentencing judges, do not have time to retry a prior conviction. See *Taylor*, 495 U.S. at 601 (“[T]he practical difficulties and potential unfairness of a factual approach are daunting.”); *Pichardo-Sufren*, 24 I&N Dec. at 335; notes 196-99 and accompanying text, *infra*. However, unlike the criminal sentencing context, the use of the categorical approach in removal proceedings is not mandated by the Sixth Amendment, as there is no right to a jury trial in removal proceedings. See *Shepard*, 544 U.S. at 24 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (reasoning that a sentencing judge’s factual inquiry into the underlying offense would raise Sixth Amendment concerns, since any fact other than a prior conviction that raises the limit of a possible sentence must be found by a jury, not a judge, in the absence of a defendant’s waiver of such rights); *Ali v. Mukasey*, 521 F.3d 737, 741 (7th Cir. 2008). Also, the burdens of proof do not line up in criminal and removal cases, as in a criminal case, the prosecution must prove every element “beyond reasonable doubt,” whereas in a

Applying the categorical approach, the judge in Juan’s case will look at the statute of conviction, larceny. The state in which Juan was convicted has a broad larceny statute, which punishes some offenses that involve moral turpitude (permanent takings) and some that do not (temporary takings).⁴¹ The judge then looks at the record of conviction, which includes the charging document and Juan’s plea agreement.⁴² If these documents do not indicate whether he was convicted for a permanent or temporary taking, Juan is not removable, as the burden is on DHS to prove removability.⁴³

C. In re Silva-Trevino: *The New Moral Turpitude Test*

In *Silva-Trevino*, a 2008 precedent decision, AG Mukasey overhauled the categorical approach, creating a new three-part test to determine whether an offense is a CIMT.⁴⁴ In the first step, an immigration judge must determine whether there is a “realistic probability, not a theoretical possibility,” that the statute under which the noncitizen was convicted reaches conduct that does not involve moral turpitude.⁴⁵ In the second step, if the statute is divisible, he instructs judges to use the traditional categorical approach, looking to the record of conviction to determine whether the offense involved moral turpitude.⁴⁶ The third step is where the AG significantly broke with the traditional categorical approach: “[w]hen the record of conviction is inconclusive, judges may, to the extent

removal case, the government must prove every element of a removal ground by “clear and convincing evidence.” See *Nijhawan*, 129 S. Ct. at 2303; 8 U.S.C. § 1229a(c)(3)(A).

⁴¹ See *In re D-*, 1 I&N Dec. at 144-45.

⁴² See *Milian-Dubon*, 25 I&N Dec. at 199.

⁴³ See 8 U.S.C. § 1229a(c)(3)(A).

⁴⁴ See *Silva-Trevino*, 24 I&N Dec. at 689-704.

⁴⁵ 24 I&N Dec. at 690 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The AG stated, “Imagination is not...the appropriate standard under the framework set forth in this opinion. Instead, the question is whether there is a ‘realistic probability, not a theoretical possibility,’ that the...statute would be applied to reach conduct that does not involve moral turpitude.” *Id.* at 708. The “realistic probability” test requires respondents to cite actual (not hypothetical) cases in which the relevant criminal statute is applied to conduct that does not involve moral turpitude. See *In re Loussaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Silva-Trevino*, 24 I&N Dec. at 698). This new approach shifts the burden to respondents to produce a case in which non-turpitudinous conduct was actually punished by the statute, a task that can be extremely difficult since many criminal statutes are enforced through plea agreements that never produce a written decision. See *Nunez v. Holder*, 594 F.3d 1124, 1138 n.10 (9th Cir. 2010); *Jean-Louis*, 582 F.3d at 482; *Norton Tooby and Dan Kesselbrenner, Living With Silva-Trevino*, 8-11 (2009), available at <http://nationalimmigrationproject.org/legalresources.htm#cdd>.

⁴⁶ *Silva-Trevino*, 24 I&N Dec. at 690.

they deem necessary and appropriate, consider evidence beyond the formal record of conviction.”⁴⁷

The AG wrote a detailed opinion describing the reasons for overhauling the categorical approach in the CIMT context.⁴⁸ He first pointed to some ambiguity in the INA,⁴⁹ which would allow the agency to command deference in this new analysis.⁵⁰ The AG next discussed a “patchwork” of circuit court decisions on the use of the categorical approach; in the name of the uniform application of immigration law, he wished to create one approach to the CIMT analysis with his decision in *Silva-Trevino*.⁵¹ The AG also concluded that the categorical approach can be under-inclusive, since some noncitizens who committed offenses that actually involved moral turpitude would be free from removal if they were convicted under a broad statute, or over-inclusive, since some courts

⁴⁷ *See id.* Step three of the new CIMT analysis was foreshadowed by two 2007 BIA decisions in which the BIA started to reject the categorical approach, allowing judges to peer behind the record of conviction and engage in a factual, not categorical, inquiry. *See* Matter of Gertsenshteyn, 24 I&N Dec. 111, 115-16 (BIA 2007) (creating a bifurcated approach for analyzing prostitution aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(K)(ii), which requires judges to use the categorical approach to determine whether the offense involves prostitution, but permits judges to use a factual inquiry to determine whether the offense was committed for commercial advantage); *see also* Matter of Babaisakov, 24 I&N Dec. 306, 322 (BIA 2007) (applying the bifurcated approach to another aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(i), and holding that judges should use the categorical approach to determine whether the offense involves fraud, but may use a factual inquiry to determine whether the loss to the victim exceeded \$10,000). In *Nijhawan v. Holder*, the Supreme Court applied the bifurcated approach for analyzing fraud aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(M)(i); the Court held that judges would use the categorical approach to determine whether the offense involves fraud, but may use a factual inquiry to determine the loss to the victim. *See* 129 S. Ct. at 2302.

⁴⁸ *See* *Silva-Trevino*, 24 I&N Dec. at 688-704.

⁴⁹ *See id.* at 693. For example, two deportation statutes use the phrase “convicted of” a CIMT, which would indicate Congressional preference for the categorical approach; however, one inadmissibility statute uses the phrase “committed” a CIMT. *See id.* (citing 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), (ii)); *see also* *Velazquez-Herrera*, 24 I&N Dec. at 513. He also highlighted the use of the word “involving” in the phrase “crime involving moral turpitude” to indicate a Congressional preference for a factual inquiry. *See* *Silva-Trevino*, 24 I&N Dec. at 693 (citing *Marciano*, 450 F.2d 1022, 1028 (8th Cir. 1971) (Eisele, J., dissenting) (“[Congress] said that deportation was the consequence when the crime involved moral turpitude, and I can only assume that it meant when moral turpitude was *in fact* involved.”) (emphasis in original)).

⁵⁰ *See* *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005) (giving *Chevron* deference to an agency’s statutory interpretation even though it conflicts with prior agency and circuit court interpretations).

⁵¹ *See* *Silva-Trevino*, 24 I&N Dec. at 694; note 305, *infra*.

consider the “general nature” of the crime and its classification in “common usage.”⁵²

The AG discussed a major argument in favor of the categorical approach, that of administrative efficiency.⁵³ He reasoned that “administrative efficiency...is ‘secondary to the determination and enforcement of’ statutory language and ‘obvious legislative intent.’”⁵⁴ He disagreed with the BIA’s prior reasoning that permitting inquiry beyond the record of conviction would provide “no clear stopping point” to re-litigation of past crimes.⁵⁵ He stated that his new approach is “not an invitation to re-litigate the conviction itself;”⁵⁶ however, he provided little guidance to judges on how to determine whether an offense involved moral turpitude if the statute is divisible. He merely stated, “a hierarchy of evidence certainly may be appropriate to ensure administrative workability and to avoid engaging in a retrial of the alien’s prior crime.”⁵⁷

Of note was the AG’s decision-making process. The opinion in *Silva-Trevino* was a result of a “secret process” in which he certified the decision to himself without indicating to the parties that he was considering overhauling the categorical approach.⁵⁸ In Mr. Silva-Trevino’s case, the

⁵² The AG, citing the dissenting opinion in *Marciano*, highlighted the potential for the categorical approach to yield over- or under-inclusive determinations:

I cannot believe that Congress intended for [persons who have actually committed crimes involving moral turpitude] to be allowed to remain simply because there might have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment...[However,] [t]he statute says deportation shall follow when the crime committed involves moral turpitude, not when that type of crime ‘commonly’ or ‘usually’ does.

Id. at 695 (quoting *Marciano*, 450 F.2d at 1027-28 (Eisele, J., dissenting)).

⁵³ See *Silva-Trevino*, 24 I&N Dec. at 702; notes 196-99, *infra*. The AG also discussed why the categorical approach as used in the sentencing context was not a good fit for immigration cases. First, he reasoned that “moral turpitude” is never an element of a noncitizen’s prior offense; while it is “simple” for a sentencing court employing the categorical approach to search for the necessary elements in the statute of conviction for the prior offense, an immigration court never will find “moral turpitude” listed in the elements of the statute. *Id.* at 700-01. The AG also reasoned that the Sixth Amendment does not apply to removal cases, so the constitutional concern arising in sentencing cases does not mandate the categorical approach in immigration cases. See *id.* at 701.

⁵⁴ *Id.* at 702 (quoting *Marciano*, 450 F.2d at 1029 (Eisele, J., dissenting)).

⁵⁵ *Silva-Trevino*, 24 I&N Dec. at 702 (quoting *Pichardo-Sufren*, 21 I&N Dec. at 336).

⁵⁶ *Silva-Trevino*, 24 I&N Dec. at 703.

⁵⁷ See *id.*

⁵⁸ See Memorandum of Law of *Amici Curiae* American Immigration Lawyers Association et al. in Support of Reconsideration 1, 5-6, Order No. 3034-2009, *Silva-Trevino*, A013-014-303 (AG Jan. 15, 2009), available at <http://bibdaily.com/pdfs/Silva%20Trevino%20recon%20denied%201-15-09.pdf> [hereinafter “Reconsideration Memo”].

BIA had decided that his offense was not a CIMT and remanded the case to the immigration judge to hold a hearing on relief from removal.⁵⁹ The BIA's decision did not question established precedent on the categorical approach or the standard for determining whether a crime involves moral turpitude.⁶⁰ One year later, Mr. Silva-Trevino's lawyer was informed by the BIA that the Attorney General had certified the case to himself.⁶¹ The notice did not identify the issues that the Attorney General would consider; nor did it define the scope of his review, provide a briefing schedule or apprise counsel of the applicable briefing procedure.⁶² Mr. Silva-Trevino's attorney attempted to inquire about the reason for referral to the Attorney General, but received no response.⁶³ Because the certification order was not made public, stakeholders – immigrants' rights organizations, immigration judges, ICE and many others – were not given the opportunity to give input on this drastic change to immigration law.⁶⁴

The Attorney General decided *Silva-Trevino* on November 7, 2008, days after the election results determined that a new administration would gain control of the Department of Justice.⁶⁵ On November 19, 2008, the decision was first made public and therefore binding on all future parties.⁶⁶ Three days later, Mr. Silva-Trevino's lawyer received a faxed copy of the decision.⁶⁷ A motion to reconsider, which included a lengthy *amicus* brief signed by several immigrants' rights organizations, was filed on December 5, 2008.⁶⁸ In a one-paragraph order dated January 15, 2009 (two business days before the Bush administration left office), AG Mukasey denied the motion for reconsideration, stating:

Having reviewed the motion and supporting materials, including briefs submitted by various nonprofit organizations as *amici curiae*, I find no basis for reconsideration of the decision. Among other things, this matter was properly certified and decided in accordance with settled Department of Justice procedures, and there is no

⁵⁹ *Silva-Trevino*, 24 I&N Dec. at 692.

⁶⁰ See Reconsideration Memo, *supra* note 58, at 5 (citing BIA Op. dated Aug. 8, 2006).

⁶¹ Reconsideration Memo, *supra* note 58, at 5. 8 C.F.R. § 1003.1(h)(i) gives the AG authority to review any decision by the BIA.

⁶² *Jean-Louis*, 582 F.3d 462, 471 n.11 (3d Cir. 2010); Reconsideration Memo, *supra* note 58, at 1, 5-6.

⁶³ Reconsideration Memo, *supra* note 58, at 6.

⁶⁴ See *Jean-Louis*, 582 F.3d at 471 n.11; Reconsideration Memo, *supra* note 58, at 6.

⁶⁵ See *Silva-Trevino*, 24 I&N Dec. 687.

⁶⁶ Reconsideration Memo, *supra* note 58, at 6; 8 C.F.R. § 1003.1(g).

⁶⁷ Reconsideration Memo, *supra* note 58, at 6.

⁶⁸ See generally Reconsideration Memo, *supra* note 58.

entitlement to briefing when a matter is certified for Attorney General review.⁶⁹

II. Many Types of Deference

Immigration judges and circuit courts alike now must grapple with *Silva-Trevino*'s new moral turpitude test. An outstanding question is whether the Attorney General's decision should command deference by courts under *Chevron*.⁷⁰ This section examines different types of deference in administrative law.

A. From Skidmore to Chevron Deference

Soon after the New Deal's "watershed period in the creation of new federal administrative agencies,"⁷¹ courts agreed that Congress could delegate law-making power to agencies.⁷² Courts then had to decide who should have the final say in matters of statutory interpretation: courts or

⁶⁹ Order No. 3034-2009, *Silva-Trevino*, A013-014-303 (AG Jan. 15, 2009), available at <http://bibdaily.com/pdfs/Silva%20Trevino%20recon%20denied%201-15-09.pdf>.

⁷⁰ Only one circuit court, the Third Circuit, has examined this question in any detail; this decision is discussed in Part IV, *infra*. See *Jean-Louis*, 582 F.3d 462. The Eighth Circuit, without significant discussion, refused to apply *Silva-Trevino* because it conflicted with the court's precedent. See *Guardado-Garcia v. Holder*, 2010 U.S. App. LEXIS 16110, at *5-6 (8th Cir. Aug. 4, 2010). The Ninth Circuit declined to consider a challenge to the retroactive application of the *Silva-Trevino* framework; the court remanded the case because the petitioner's hearing did not comport with due process. See *Castruita-Gomez v. Holder*, 2010 U.S. App. LEXIS 18612, at *3-4 (9th Cir. Sept. 3, 2010). The Ninth Circuit also is considering another challenge to the *Silva-Trevino* framework; in both Ninth Circuit cases, immigrants' rights organizations filed *amicus* briefs highlighting the various problems with the AG's decision. See Brief of *Amici Curiae* Immigrant Defense Project et al., *Castruita-Gomez v. Holder*, No. 06-74582 (9th Cir.), available at <http://www.immigrantdefenseproject.org/webPages/other.htm> [hereinafter *Castruita-Gomez Amicus Brief*]; Brief of *Amici Curiae* Immigrant Defense Project et al., *Zamudio-Ramirez v. Holder*, No. 09-71083 (9th Cir.), available at <http://www.immigrantdefenseproject.org/webPages/other.htm> [hereinafter *Zamudio-Ramirez Amicus Brief*].

⁷¹ Jerry L. Mashaw, Richard A. Merrill, Peter M. Shane, *Administrative Law: The American Public Law System, Cases and Materials* 5 (6th ED. 2009).

⁷² See *Yakus v. U.S.*, 321 U.S. 414, 423-26 (1944) (upholding Congressional delegation of authority to set prices during wartime, which was implemented by the Office of Price Administration); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447-48 (1987) (discussing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which invalidated the National Industrial Recovery Act as an unconstitutional delegation of lawmaking power, and stating: "[t]he constitutional assault eventually disintegrated in the face of prolonged and persistent popular support of regulatory administration").

agencies. The Supreme Court decided initially that courts would give a light amount of deference to the agency because of its technical expertise in the subject matter.⁷³ In *Skidmore v. Swift & Co.*,⁷⁴ the Supreme Court in 1944 described a certain level of deference that was due to agency decisions:

We consider that the rulings, interpretations and opinions of the Administrator under this Act [Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁷⁵

The Supreme Court thus decided that the agency's technical expertise and manner in which it decided an issue of statutory interpretation gave it "power to persuade" a court.⁷⁶ Over the course of forty years, however, the Court changed its opinion on just how persuasive an agency's interpretation was.

In its 1984 decision *Chevron, U.S.A. Inc. v. NRDC*,⁷⁷ the Supreme Court held that a reviewing court should defer to the agency's reasonable interpretation of an ambiguous term that appears in the statute the agency was charged to administer.⁷⁸ The Court held,

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative

⁷³ See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985) (referring to *Skidmore v. Swift*, 323 U.S. 134 (1944), as the Court's "courteous regard" for agency decisions).

⁷⁴ 323 U.S. 134 (1944).

⁷⁵ *Id.* at 140.

⁷⁶ See *id.*; see also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 13 (1990) (referring to this analysis as "*Skidmore* consideration," under which "the agency interpretation is a substantial input and counts for something...[b]ut the authoritative act of interpretation remains with the court.").

⁷⁷ 467 U.S. 837 (1984).

⁷⁸ *Id.* at 843-44.

regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.⁷⁹

In what is famously known as the *Chevron* two-step analysis,⁸⁰ first a reviewing court, “employing the traditional tools of statutory construction,”⁸¹ determines whether the statute is ambiguous. If the statute is clear, the court gives effect to that meaning.⁸² If the statute is ambiguous, the court defers to the agency’s interpretation, so long as it is reasonable.⁸³ In determining whether a given interpretation is reasonable, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”⁸⁴

The Court justified the rule by reasoning that the agency’s expertise surpassed that of a court when the question involved a technically complex issue.⁸⁵ Issues that agencies regulate also involve competing interests from several parties; the Court reasoned that Congress may not have desired to wade into the fray and preferred to delegate the question to the agency:

Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with greater expertise and charged with responsibility for administering the

⁷⁹ *Id.*

⁸⁰ See Sunstein, *Chevron Step Zero*, *supra* note 3, at 190. Scholars have debated how many steps *Chevron* has. See, e.g., Kenneth A. Bamberger and Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611 (2009); but see Matthew C. Stephenson and Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

⁸¹ *Chevron*, 467 U.S. at 843 n.9. Scholars have discussed what the “traditional tools of statutory construction” are. See, e.g., Kenneth Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 75-78 (2008).

⁸² *Chevron*, 467 U.S. at 842-43.

⁸³ *Id.* at 844.

⁸⁴ *Id.* at 843 n.11.

⁸⁵ *Id.* at 865. The leading normative theory for *Chevron* is that agencies have greater policy expertise than courts. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002). Professor Cass Sunstein cites this theory’s roots in legal realism: “[p]erhaps the two-step inquiry is based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value, and those judgments should be made by political rather than judicial institutions.” Sunstein, *Chevron Step Zero*, *supra* note 3, at 197. However, Professor Elhauge writes that the “the legal realists’ hope that legal ambiguities can be resolved by objective policy expertise has long ago grown quaint.” Elhauge, *supra* note 85, at 2135. This is because expertise cannot resolve which statutory interpretation has the “best” policy implications; also, “in practice, it is rare to find a field of social policy where there are no experts on opposing sides of an issue, each retained by a rival camp, undermining any claim to an objective expert resolution.” *Id.*

provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.⁸⁶

Chevron greatly expanded the level of deference that a court would give to an agency's interpretation of a statute,⁸⁷ creating a significant break from *Skidmore*.⁸⁸ Although praised for the clear line that it drew for courts reviewing agency action,⁸⁹ *Chevron* left many questions unanswered in

⁸⁶ *Chevron*, 467 U.S. at 865. Scholars cite the political justifications for the *Chevron* doctrine, explaining why Congress delegates interpretive authority to the agency. See, e.g., Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L. J. 549, 566-71 (2009). Professor Bressman describes that under a positive political theory, Congress is composed of members who wish to spend time on activities that improve their reelection chances; members lack both time and expertise to devote to technically complex issues, so they delegate them to agencies. *Id.* at 566-67. Congress never can develop the expertise needed and convert that expertise directly into law because it is inefficient to do so, since all decisions made by legislative committees must pass through the floor, which works as a policy middle-man that can alter legislation. *Id.* at 567. Agencies, on the other hand, are not hampered by this process and their rulings can become law directly. *Id.* She cites Congress' desire to "write just enough policy to receive a positive response for its actions, while deflecting any negative attention for the burdensome details to the agency." *Id.* at 568. In addition, Congress may choose ambiguous words to obtain consensus, since both parties can claim a victory and then later influence agency decision-makers to support their own legislative agendas when sorting out the details. *Id.* at 571. "By choosing words that 'mean all things to all people,' Congress can obtain the requisite support to enact a bill while preserving opportunities to recommence the battle at another time and in another place." *Id.* at 571-72 (citing Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL'Y 287, 290 (1989)); see also Elhauge, *supra* note 85, at 2127 (interpreting *Chevron* as a default rule that constrains judges to maximize political preference satisfaction because "the policy views that govern actions of agency heads...generally come about as close to an accurate barometer of current political preferences as courts can get.").

⁸⁷ Professor Sunstein states that "shortly after it appeared, *Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state." Sunstein, *Chevron Step Zero*, *supra* note 3, at 188; cf. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

⁸⁸ See Merrill and Hickman, *supra* note 3, at 853-56; see also *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and dissenting in part) ("*Skidmore* deference to authoritative agency views is an anachronism, dating from the era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect...That era came to an end with our watershed decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*").

⁸⁹ See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 512 (1989).

administrative law.⁹⁰ One such unanswered question was how the agency's use of procedures affects a reviewing court's deference.

B. Deference Tailored to the Agency's Procedures

An agency can make a decision through a spectrum of formal and informal procedures.⁹¹ On one end of the spectrum is notice-and-comment rulemaking.⁹² Courts have interpreted the notice-and-comment rulemaking provisions of the Administrative Procedure Act ("APA") in such a way that these procedures have "come to resemble an elaborate 'paper hearing.'"⁹³ Agencies must provide supporting documentation with the notice of proposed rulemaking, respond in detail to all substantial comments and proffer a lengthy justification for the final rule, including explanations of why it rejected alternatives.⁹⁴ As one scholar states, "notice-and-comment

⁹⁰ See Merrill and Hicks, *supra* note 3, at 840-852 (discussing fourteen questions left unresolved by *Chevron* and four decisions in which Court attempted to answer some of the unresolved questions).

⁹¹ Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) [hereinafter Bressman, *How Mead Has Muddled*] ("All procedures are not created equal."). Not all agencies have the authority to engage in a range of policymaking tools; Congress determines which types of policymaking tools an agency can use. See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90 (2004).

⁹² In this article, I refer to informal rulemaking as "notice-and-comment rulemaking" or "rulemaking." Informal rulemaking is governed by 5 U.S.C. § 553. The term "informal" distinguishes this form of rulemaking from formal rulemaking, which requires an oral hearing complete with procedural requirements. Congress directs agencies which form of rulemaking to employ; when the statute requires rules to be made "on the record after opportunity for an agency hearing," the agency should engage in formal rulemaking, governed by 5 U.S.C. §§ 553, 556 and 557. See 5 U.S.C. § 553(c). Because agencies utilize informal rulemaking more often than formal rulemaking, in this article, I discuss informal rulemaking as the one end of the "process" spectrum. See Mashaw, Merrill, and Shane, *Administrative Law: The American Public Law System, Cases and Materials*, *supra* note 71, at 507-10 (discussing statutes that require formal rulemaking, many of which were enacted prior to the APA); see also *id.* at 509-10 (discussing cases in which agencies abandoned formal rulemaking because it made implementation of a new policy "virtually impossible").

⁹³ Matthew S. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553 (2006); Magill, *supra* note 91, at 1390 ("[T]oday, promulgating a legislative rule is a labor-intensive enterprise. While there are many reasons for this, it is unquestionably due in part to judicially imposed requirements that an agency must follow if it expects to survive a challenge to its action in court....").

⁹⁴ See Stephenson, *supra* note 93, at 553-554 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080-81 (D.C. Cir. 2003); *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-32 (D.C. Cir. 1982)).

rulemaking fosters logical and thorough consideration of policy...[and] promotes predictability...[a]t a minimum, it allows affected parties, who participate in the formulation of a rule, to anticipate the rule and plan accordingly.”⁹⁵

Adjudications fall somewhere in the middle of this spectrum.⁹⁶ They provide important procedural protections to individual litigants, as they result from a detailed trial-like gathering of evidence by the agency.⁹⁷ While normally binding only on the parties to that proceeding, many orders operate as precedent, which will bind future parties.⁹⁸ As compared to rulemaking, adjudications as policymaking tools for agencies do not provide opportunity for input to the same extent because they involve only a limited class of persons.⁹⁹ Adjudications also may not be able to issue broad pronouncements in the same way as rulemaking because they are tailored to the facts of an individual litigant’s case, which may lead to bad facts making bad law.¹⁰⁰ Additionally, adjudications create retroactive

⁹⁵ Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N. Y. U. L. REV. 461, 542 (2003) [hereinafter Bressman, *Beyond Accountability*].

⁹⁶ *See id.* at 542.

⁹⁷ *See* Magill, *supra* note 91, at 1391. There are two types of adjudications, formal and informal. Formal adjudications, which are governed by 5 U.S.C. §§ 554, 556-557, are mandated when the statute requires a hearing to be “on the record after an opportunity for an agency hearing.” These are trial-type procedures, which include requirements that the parties be given notice of the “matters of facts and law asserted,” § 554(b)(3), an opportunity for “the submission and consideration of facts [and] arguments,” § 554(c)(1), and an opportunity to submit “proposed findings and conclusions” or “exceptions,” § 557(c)(1), (2). Information adjudications, the basic requirements of which are set forth in 5 U.S.C. § 555, do not mandate such procedures. *See* 5 U.S.C. § 555.

⁹⁸ *See* Bressman, *Beyond Accountability*, *supra* note 95, at 542 (noting that the National Labor Relations Board (“NLRB”) frequently uses adjudication as a policymaking tool); Magill, *supra* note 91, at 1394, 1385 (noting that the NLRB and the Federal Trade Commission largely make policy by adjudicating individual cases, whereas the Federal Communications Commission does so by promulgating legislative rules); *see also* Charles H. Koch Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 695 (2005) (“Even though most agencies possess general policymaking processes, administrative adjudications remain a critical part of administrative policymaking.”).

⁹⁹ *See* Bressman, *Beyond Accountability*, *supra* note 95, at 542; Magill, *supra* note 91 at 1391, 1396. In his dissenting opinion in *Wyman-Gordon*, Justice Douglas praised the value of rulemaking procedures for its facilitation of input from the public:

Agencies discover that they are not always the repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice...Public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs us all.

Wyman-Gordon, 394 U.S. at 777-78 (Douglas, J., dissenting).

¹⁰⁰ *See* Bressman, *Beyond Accountability*, *supra* note 95, at 542; Magill, *supra* note 91, at 1396.

rules because the agency applies the new policy to the individual whose case is before it.¹⁰¹

On the other end of the spectrum are procedures such as guidance documents, policy statements and interpretive rules.¹⁰² This guidance can appear in manuals used by agency personnel, private letter rulings, advice given over the phone and public notices such as press releases or congressional testimony.¹⁰³ While these procedures assure virtually no public input or deliberation and do not have binding effect, they are less costly and more efficient for an agency.¹⁰⁴ Which procedure should an agency choose to make policy?¹⁰⁵ How does the choice of procedures interface with the *Chevron* doctrine?

In *United States v. Mead Corporation*,¹⁰⁶ the Supreme Court in 2001 held that an agency's choice of procedures affect whether that decision will command *Chevron* deference. The Court examined a Customs Service's

¹⁰¹ See *id.*; but see Magill, *supra* note 91 at 1435 (noting examples in which courts required the NLRB to apply a new policy announced in adjudication prospectively only).

¹⁰² Interpretive rules explain a statute or regulation; they are interpretations of already-existing legal norms and therefore do not have legal effects on private parties. See Magill, *supra* note 91, at 1386, 1412.

¹⁰³ *Id.* at 1391. Professor Magill states the purposes for such guidance:

Some of these instruments are designed to control the discretion of the agency's front-line bureaucrats, some to advise regulated parties how to comply with regulatory requirements or how the agency will exercise its enforcement discretion, and others to advance the agency's position about its authority with respect to a one-time but important controversy.

Id. at 1391-92.

¹⁰⁴ See *id.*

¹⁰⁵ The Supreme Court has held that an agency has great freedom to decide whether to use rulemaking or adjudication to decide policy. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("*Chenery II*"); see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality opinion) (refusing to compel agency to establish law through rulemaking process before applying it in adjudication); *NLRB v. Bell Aerospace*, 416 U.S. 267, 294 (1974) (holding that a reviewing court only will examine the agency's choice of procedures under the "abuse of discretion" standard). The Supreme Court in *Chenery II* stated: "to insist upon one form of action to the exclusion of the other is to exalt form over necessity." *Chenery II*, 332 U.S. at 202. However, the Court expressed a preference for rulemaking: "[t]he function of filling in the interstices of the [statute] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." See *id.* The Court recognized that adjudication often may be necessary to set policy:

[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

Id. at 202-203.

¹⁰⁶ 533 U.S. 218 (2001).

tariff ruling letter, which set tariff classifications for particular imports.¹⁰⁷ The ruling letters represented the official position of the Customs Service with respect to the particular transaction, yet were subject to modification or revocation without notice to any person other than the person to whom the letter was addressed.¹⁰⁸ The regulations governing such letters provided that they were binding only on the party to that transaction; “no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.”¹⁰⁹ The ruling letters were not subject to notice and comment before being issued and generally could be modified without notice and comment.¹¹⁰ They did not need to be published; they needed only to be made “available for public inspection.”¹¹¹ Any of the forty-six port of entry Customs offices or the Customs Headquarters Office could issue such ruling letters.¹¹² Additionally, most ruling letters contained little or no reasoning, although the letter at issue in the case set out its rationale in some detail.¹¹³

The Court held that such ruling letters were not due *Chevron* deference because of the manner in which the letters were written. The Court held,

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.¹¹⁴

The Court reasoned that Congress can explicitly or implicitly delegate legislative power to an agency to fill in the details of a statutory ambiguity,¹¹⁵ and that a “very good indicator or delegation meriting *Chevron* treatment” is express authorization to engage in the process of

¹⁰⁷ *See id.* at 222.

¹⁰⁸ *Id.* at 222-23 (citing 19 C.F.R. §§ 177.9(a) and (c)).

¹⁰⁹ *Id.* at 223 (quoting 19 C.F.R. § 177.9(c)).

¹¹⁰ *Id.* at 223 (citing 19 C.F.R. § 1625(a) and 177.10(c)).

¹¹¹ *Id.* at 223 (quoting 19 U.S.C. § 1625(a)).

¹¹² *Id.* at 224 (citing 19 C.F.R. § 177.11(a)).

¹¹³ *Id.*

¹¹⁴ *Id.* at 226-27.

¹¹⁵ *Id.* at 229.

rulemaking or adjudication.¹¹⁶ The Court held, “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”¹¹⁷ The Court noted that the overwhelming majority of cases applying *Chevron* deference involved the review of the fruits of notice-and-comment rulemaking or formal adjudication, yet acknowledged that it sometimes accorded *Chevron* deference to agency decisions without such administrative formality.¹¹⁸

The Court held that because the tariff ruling letters were “best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines,’”¹¹⁹ they were not due *Chevron* deference.¹²⁰ The Court did not, however, entirely disregard the agency’s interpretation and conduct a *de novo* review of the legal question. Rather, the Court reverted to its pre-*Chevron* level of deference under *Skidmore*, which gave some, but not automatic, deference to an agency’s decision.¹²¹ The Court recognized the myriad of administrative statutes and reasoned that there is more than one variety of judicial deference.¹²² The Court thus remanded the case for consideration of whether the agency’s decision was due some deference because of its specialized knowledge.¹²³

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 230.

¹¹⁸ *Id.* at 230-31.

¹¹⁹ *Id.* at 234 (quoting *Christensen*, 529 U.S. at 587).

¹²⁰ *Id.*

¹²¹ *Id.* at 234; *Skidmore*, 323 U.S. at 139.

¹²² *Mead*, 533 U.S. at 236.

¹²³ *Id.* at 235, 239. *Mead* was not the first time the Court opined about the level of *Chevron* deference to be given to administrative procedures that were less formal than notice-and-comment rulemaking. In *Christensen*, the Court considered whether the Fair Labor Standards Act (“FLSA”) prohibited a State or subdivision thereof from compelling employees to utilize accrued compensatory time in lieu of paying it out to the employees. *Christensen*, 529 U.S. at 580-81. The county had written to the U.S. Department of Labor’s Wage and Hour Division, who wrote an opinion letter interpreting the FLSA and regulations to preclude the county from compelling such use of compensatory time. *Id.* The Court rejected the petitioners’ claim that the county violated the FLSA, reasoning that the petitioners’ reading of the statute, the reading shared by the Department of Labor in its opinion letter, was “backwards.” *Id.* at 588. In its discussion of whether the Department of Labor’s opinion letter merited *Chevron* deference, the Court stated,

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference... Instead, interpretations contained in formats such as opinion letters are ‘entitled to respect’

The Supreme Court in *Mead* did not set a hard-and-fast rule that only agency interpretations resulting from formal notice-and-comment rulemaking deserved *Chevron* deference.¹²⁴ This failure to set a clear rule is one of scholars' criticisms of the decision.¹²⁵ *Mead* has been both praised and disparaged; its meaning has been the topic of much scholarship following the decision.

C. Exploring Chevron Step Zero

Scholars and courts alike have pondered the meaning of the *Mead*¹²⁶ and particularly, the threshold question of "Chevron Step Zero – the initial

under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the "power to persuade."

Id. at 587 (quoting *Skidmore*, 529 U.S. at 140).

¹²⁴ Two years after the *Mead* decision, the Court rejected an argument that only agency interpretations resulting from notice-and-comment rulemaking merited *Chevron* deference. See *Barnhart v. Walton*, 535 U.S. 212 (2002). In *Barnhart*, at issue was the Social Security Administration's interpretation of "disability." *Id.* at 214. The agency had recently, "perhaps in response to this litigation," promulgated regulations to answer the question at issue in the case. The Court deferred to the agency's reasonable interpretation, partly because it was issued through notice-and-comment rulemaking, but also because it was a long-standing interpretation, which the agency had previously expressed through less formal procedures. *Id.* at 221. The Court stated, "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking...does not automatically deprive that interpretation of the judicial deference otherwise its due." *Id.*

¹²⁵ See, e.g., Bressman, *How Mead Has Muddled*, *supra* note 91, at 1475; Sunstein, *Chevron Step Zero*, *supra* note 3, at 193. Several scholars argue that the Court "wanted to regain the interpretive power that courts lost to Chevron by increasing the hurdles that agencies face under Chevron." Bressman, *How Mead Has Muddled*, *supra* note 91 *Judicial Review of Agency Action*, at 1482. In this sense, *Mead* is seen as a power grab by courts. See Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 751 (2002) (arguing that *Mead* "represents a naked power grab by courts"); David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 225 (2001) (hypothesizing that the *Mead* Court's rhetoric about congressional intent may be to "cloak judicial aggrandizement"); see also Elhauge, *supra* note 85, at 2157 n.462 (discussing assumption that judges intend to maximize their own statutory preferences).

¹²⁶ See, e.g., Bressman, *How Mead Has Muddled*, *supra* note 91, at 1475; Sunstein, *Chevron Step Zero*, *supra* note 3, at 193 (criticizing *Mead*'s "force of law" test as "a crude way of determining whether Chevron deference is appropriate"); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833 (2002) ("[*Mead*] comes up short in terms of articulating a meta-rule to guide lower courts in future controversies."); see also *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 913, 921 (9th Cir. 2003) ("After *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* applies, and *Mead* provides an example of when it does not.").

inquiry into whether the Chevron framework applies at all.”¹²⁷ The *Mead* Court left undefined what it means for an agency decision to have the “force of law.”¹²⁸ Professor Thomas Merrill identifies three factors relevant to whether a decision has the force of law: “(1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to adopt rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction.”¹²⁹ Accordingly, the scholarship divides into three primary justifications for *Mead*: (1) the importance of procedures; (2) the importance of binding effect; and (3) the importance of authoritativeness.

Several scholars have discussed the importance of procedural formality to *Mead*’s “force of law” test. Professor Cass Sunstein reads *Mead* as “motivated by a concern that Chevron deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures.”¹³⁰ By awarding *Chevron* deference to agency decisions reached through formal procedures, *Mead* “attempt[s] to carry forward a central theme in administrative law: developing surrogate safeguards for the protections in the Constitution itself.”¹³¹ Formal procedures promote “‘fairness and deliberation’ by, for example, giving people an opportunity to be heard and offering reasoned responses to what people have to say,”¹³² whereas “informal processes...are unlikely to promote values of

¹²⁷ Sunstein, *Chevron Step Zero*, *supra* note 3, at 191 (attributing the term “Chevron Step Zero” to Merrill and Hickman, *supra* note 3, at 836). In his article *Chevron Step Zero*, Professor Sunstein discusses the force of law holding in *Mead* and the related cases of *Barnhart* and *Christensen*. *See id.* at 211-31 (citing *Barnhart*, 535 U.S. 212 and *Christensen*, 529 U.S. 576). He also discusses a separate Step Zero trilogy involving *Chevron* deference when the agency is deciding interstitial or major questions. *See id.* at 231-47 (discussing *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

¹²⁸ *See* Merrill, *supra* note 126, at 813 (stating that the *Mead* Court did not identify the triggering conditions for determining when an agency has been given the power to act with the force of law).

¹²⁹ *Id.* Professor Merrill discussed a possible a fourth factor, “whether the agency had sought to exercise such authority,” which he discounted because the *Mead* Court collapsed this inquiry with the question of whether Congress authorized the agency to act with authority. *Id.* at 814 n.41. He also discussed a fifth factor, “whether Congress has provided for de novo review of the agency action that incorporates the interpretation,” which he discounted because the Court held in *U.S. v. Hagggar Apparel Co.*, 526 U.S. 380, 394 (1999), that an agency’s regulation merits *Chevron* deference notwithstanding a statutory provision of de novo review by a court. *Id.*

¹³⁰ Sunstein, *Chevron Step Zero*, *supra* note 3, at 227.

¹³¹ *Id.* at 225.

¹³² *Id.* at 225 (quoting *Mead*, 533 U.S. at 230).

participation and deliberation.”¹³³ Professors Thomas Merrill and Kristin Hickman write that the “correspondence between the delegation to act with the force of law and the existence of rights of public participation is not accidental”¹³⁴ because “[g]eneral norms of democratic governance and traditions of due process both stress the importance of affording affected persons the right to be heard before they are subjected to the coercive power of the state.”¹³⁵

Scholars argue that *Mead* allows agencies to engage in a cost-benefit analysis, weighing the cost of formal procedures, which command deference, against the more efficient and inexpensive informal rulings, which risk being overruled by a reviewing court.¹³⁶ Professor Matthew Stephenson interprets the rationale in *Mead* to have arisen “because courts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency’s mission or the degree to which the agency’s judgment

¹³³ Sunstein, *Chevron Step Zero*, *supra* note 3, at 225; *see also* Barron and Kagan, *supra* note 125, at 234 (“the [Mead] Court’s focus appears to follow from the view that deference should depend on whether agency action has a connection to the public and whether that action results from disciplined consideration.”).

¹³⁴ Merrill and Hickman, *supra* note 3, at 886. While Professors Merrill and Hickman were not writing in response to the *Mead* decision, as it had not yet been published, they discussed the “force of law” holding in *Christensen* in their article *Chevron’s Domain*. *See id.* at 882-88 (citing *Christensen*, 529 U.S. at 576).

¹³⁵ *See id.* at 886.

¹³⁶ *See* Stephenson, *supra* note 93, at 547-48 (“The very costliness of formal procedures provides [a reviewing] court with valuable information about how important the interpretive question at issue is to the agency’s policy agenda.”); Sunstein, *Chevron Step Zero*, *supra* note 3, at 225-26 (“*Mead* puts agencies to a salutary choice; it essentially says, ‘Pay me now or pay me later.’ Under *Mead*, agencies may proceed expeditiously and informally, in which case they can invoke *Skidmore* but not *Chevron*, or they may act more formally, in which case *Chevron* applies.”); Bressman, *Beyond Accountability*, *supra* note 95, at 539 (“The law-like decisionmaking requirement...ensure(s) that agencies put their money where their mouths are.”); Merrill, *supra* note 126, at 822 (“It is now clear, agencies must make a certain investment in administrative processes to obtain the *Chevron* payoff. In the vocabulary of *Christensen* and *Mead*, agencies must take whatever procedural steps are necessary to assure that their interpretation has the ‘force of law.’”); Merrill and Hicks, *supra* note 3, at 887 (“If an agency is willing to treat an interpretation as legally binding, and in so doing to subject itself to the procedural requirements associated with action that is legally binding, then the agency would be ‘rewarded’ by having its interpretation given mandatory deference by the courts.”); E. Donald Elliot, *Reinventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992) (“As in the television commercial in which the automobile repairman intones ominously ‘pay me now, or pay me later,’ the agency has a choice: It can go through the procedural effort of making a legislative rule now and avoid the burdens of case-by-case justification down the road, or it can avoid the hassle of rulemaking now, but at the price of having to engage in more extensive, case-by-case justification down the road.”).

reflects a sensible balancing of the relevant considerations.”¹³⁷ Thus, agencies that want to advocate a more aggressive reading of a statute “must decide whether it is worth paying the costs associated with formal procedures in order to ‘purchase’ greater judicial toleration of a more aggressive interpretation of the statute.”¹³⁸ He argues that *Mead* increases an agency’s incentive to use more formal procedures if the agency desires an aggressive reading of a statute; agency interpretations made through less formal procedures must be more textually plausible in order to command *Chevron* deference.¹³⁹ Because *Mead* allows only formal procedures to invoke *Chevron* deference, whereas informal procedures receive the less deferential *Skidmore* review, “the legal system as a whole will provide an ample check on agency discretion and the risk that it will be exercised arbitrarily – in one case, through relatively formal procedures and in another, through relatively careful judicial check on agency interpretations of law.”¹⁴⁰

Professor Lisa Schultz Bressman interprets *Mead* through a positive political theory lens:¹⁴¹ as an important tool in the Congressional oversight of agencies.¹⁴² She cites two theories of monitoring mechanisms: “police patrols,” which are direct forms of oversight such as committee hearings,¹⁴³ and “fire alarms,” which enlist private parties to gather information and notify Congress of proposed changes to regulatory policy.¹⁴⁴ Congress can use administrative procedures to place constituents into the administrative process, where they may alert members of Congress to agency action that

¹³⁷ Stephenson, *supra* note 93, at 530-31. “The court may, for example, believe that procedural formality facilitates the accurate evaluation of complex issues, promotes reasoned deliberation, or prevents special-interest capture.” *Id.* at 547-48. He writes, “although procedural formality and textual plausibility increase the agency’s odds of surviving judicial review, they are also both costly to the agency.” *Id.* at 531.

¹³⁸ *Id.* at 531; but see Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 796-97 (2002) (reasoning that agencies rarely consider the standard of review when deciding which formal to follow).

¹³⁹ Stephenson, *supra* note 93, at 534.

¹⁴⁰ See Sunstein, *Chevron Step Zero*, *supra* note 3, at 226.

¹⁴¹ Bressman, *Chevron’s Mistake*, *supra* note 86, at 567 (citing David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 961 (1998)). Positive political theory is described in more detail at note 86, *supra*.

¹⁴² Bressman, *Chevron’s Mistake*, *supra* note 86, at 580. Professor Bressman notes that the while *Mead* values procedures, which are a mechanism to facilitate legislative monitoring, *Mead* “botches the implementation” because it links procedures to rule-of-law values, as opposed to legislative monitoring. Bressman, *Chevron’s Mistake*, *supra* note 86, at 580.

¹⁴³ Bressman, *Chevron’s Mistake*, *supra* note 86, at 570 (citing Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984)).

¹⁴⁴ *Id.*

will change the status quo before the action is final.¹⁴⁵ The procedures thus shift monitoring costs from Congress to its constituents.¹⁴⁶ *Mead*, which requires agencies to use such procedures, ensures that Congress maintains proper oversight over agency action.¹⁴⁷ Critical to this analysis is where to strike the balance – agencies need only use procedures that provide enough information to constituents to facilitate fire alarm oversight; any additional procedures merely add cost without providing more information.¹⁴⁸

Critics reason that the Court’s holding in *Mead* requires too many procedures, which consume agency time and resources; the result is an ossification of administrative law.¹⁴⁹ The most formal of procedures commonly used by agencies, notice-and-comment rulemaking, “both symboliz[es] and amplif[ies] all that the public finds most distasteful in government.”¹⁵⁰ However, “the Constitution strikes a balance between efficiency and procedural formality, committing us to a certain degree, perhaps a large degree, of inefficiency. As the onerous requirements of the legislative process attest, efficiency often yields to procedural formality and

¹⁴⁵ *Id.*

¹⁴⁶ Bressman, *Chevron’s Mistake*, *supra* note 86, at 570.

¹⁴⁷ *See id.*; *see also* Elhauge, *supra* note 85, at 2145 (discussing the *Mead* case and stating, “the reason the doctrine depends not just on how much power the agency was granted, but on how the agency exercises its power, is that only certain methods of exercise provide the reasonable assurance that the agency action reflects current governmental preferences.”). Professor Bressman interprets the case of *Barnhart* through the lens of informational oversight by Congress. In *Barnhart*, the Court gave deference to the agency, not because of the procedures used, but for a number of other reasons, one of which was the longstanding nature of the agency’s position. Bressman, *Chevron’s Mistake*, *supra* note 86, at 583 (citing *Barnhart*, 535 U.S. at 222). This is another way that Congress ensures that the agency reflects congressional preferences, because Congress can rely on positions that the agency has maintained before or during the course of legislative drafting. Bressman, *Chevron’s Mistake*, *supra* note 86, at 583.

¹⁴⁸ *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1785 (2007) [hereinafter Bressman, *Procedures as Politics*].

¹⁴⁹ *See, e.g.*, *Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (arguing that the majority’s opinion would ossify statutory law because the agency’s flexibility to interpret the law in a new way would cease upon the first judicial resolution of the question); Barron and Kagan, *supra* note 125, at 230-31 (“These procedures consume significant agency time and resources and thereby inhibit needed regulatory (or, for that matter, deregulatory) initiatives. *Mead* inevitably will channel additional agency action into this already overburdened administrative mechanism, as agencies sometimes adopt notice-and-comment procedures for no other reason than to gain *Chevron* deference.”); *see also* Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L. J. 1385 (1992); *but see* Bressman, *Procedures as Politics*, *supra* note 148, at 1819-20, n. 381 and 382 (discussing empirical studies that have shown administrative procedures do not ossify practice).

¹⁵⁰ Barron and Kagan, *supra* note 125, at 232.

the values it secures.”¹⁵¹ Also, the *Mead* Court did not require agencies to use the most formal procedures to command *Chevron* deference;¹⁵² standard procedures such as notice-and-comment rulemaking and adjudication are mere examples of the types of procedures that are acceptable to guarantee *Chevron* deference.¹⁵³ Professor Bressman states, “unmitigated formalism is neither necessary or wise...We instead should afford Congress or agencies a little leeway to create administrative lawmaking procedures beyond trial-type or paper hearing but require that those procedures adhere to certain specified limits – in particular, that the resulting policy is transparent, rational, and binding.”¹⁵⁴

Scholars also have emphasized the importance of binding effect to the *Mead* holding. Professor Ronald Levin argues that the *Mead* inquiry should turn not on what procedures were used, but whether the agency action is binding, i.e., it “alters or determines legal rights or obligations.”¹⁵⁵ Professor Sunstein writes that the *Mead* inquiry can turn on either the formality of the agency’s procedures or the binding effect of the agency’s decision.¹⁵⁶ Professor Bressman also writes that both binding effect and procedural formalities were important to the Court’s holding in *Mead*.¹⁵⁷ She describes “binding effect” as “immediate and irrevocable until officially renounced;”¹⁵⁸ thus, “[b]inding effect is the promise of consistent application.”¹⁵⁹ She views *Mead* as an application of the constitutional requirements for lawmaking – careful consideration, transparency and consistent application – to agency action.¹⁶⁰ In this sense, *Mead*’s “law-like decisionmaking requirement” ensures that agencies exercise their policymaking authority “in ways that generally promote consistency and specifically prevent ad hoc departures at the behest of narrow interests.”¹⁶¹

¹⁵¹ Bressman, *How Mead Has Muddled*, *supra* note 91, at 1490-91.

¹⁵² *See Mead*, 533 U.S. at 227.

¹⁵³ Bressman, *How Mead Has Muddled*, *supra* note 91, at 1450.

¹⁵⁴ *Id.*

¹⁵⁵ *See Levin*, *supra* note 138, at 775; *see also id.* at 794-96 (arguing that *Mead*’s requirement of procedures to guarantee *Chevron* deference was unnecessary because the administrative requirements of finality and ripeness already require an agency to carefully consider the implications of its positions).

¹⁵⁶ Sunstein, *Chevron Step Zero*, *supra* note 3, at 222 (defining an agency decision that has the “force of law” as one that is “binding on private parties in the sense that those who act in violation of the decision face immediate sanctions...[and] if the agency is legally bound by it as well”).

¹⁵⁷ Bressman, *How Mead Has Muddled*, *supra* note 91, at 1488-89.

¹⁵⁸ *Id.* at 1489.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1479-80.

¹⁶¹ Bressman, *Beyond Accountability*, *supra* note 95, at 539; *see also id.* (“By announcing a rule that binds all similarly situated parties, agencies may stem requests for deviations except through official channels.”).

Professor Robert Anthony, an original proponent of the position the Court eventually adopted in *Mead*,¹⁶² argues that an agency's decision should not have the "force of law," or binding effect, unless the agency has used formal procedures.¹⁶³ He defines an agency decision with "binding effect" as one that "is to be applied rigidly to private persons without first affording them a realistic chance to challenge its policy,"¹⁶⁴ whereas if the agency "is open to reconsideration of the policy, the document shows neither the intent to bind nor such an effect."¹⁶⁵ He defends his position by citing the values of fairness, transparency and deliberation inherent in the rulemaking process:

Values served by the legislative rulemaking process are large ones. Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed the procedures laid down by Congress for establishing rules with the binding force of law.¹⁶⁶

Scholars also have discussed the importance of an agency decision's authoritativeness to the *Mead* analysis. By this reasoning, the procedures used by the agency are of little importance to the *Chevron* deference

¹⁶² See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, *supra* note 76.

¹⁶³ See *id.* at 4; see also Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311, 1314-15 (1992) [hereinafter Anthony, *Interpretive Rules*].

¹⁶⁴ Anthony, *Interpretive Rules*, *supra* note 163, at 1330.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1373; see also Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 409 (citing as a benefit of notice-and-comment rulemaking that the agency receives useful information from previously unknown sources and its decision is subject to the discipline of having to respond to these comments); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L. J. 381, 403 (1985) ("[A]n agency may receive more cooperation and less obstruction from regulated interests that have a hand in shaping the rules within which they must function.").

question. As stated by Professor Sunstein, “if policymaking expertise and democratic accountability are relevant, then perhaps Congress should be understood to have delegated law-interpreting power whether or not formal procedures are involved.”¹⁶⁷ Professor Sunstein suggests that the formality of the procedures used may not be the sole reason that the *Mead* Court refused to give the tariff ruling letters *Chevron* deference. Rather, the Court emphasized the number of such letters produced every year; in this way, “*Mead* emerges as a highly pragmatic case resting on the evident problems with deferring to the numerous lower-level functionaries who produce mere letter rulings.”¹⁶⁸

Professor David Barron and now Justice Elena Kagan argue that *Chevron* deference should depend on *who* is making the decision within the agency, not *how* the decision is made.¹⁶⁹ They agree with the *Mead* Court that “deference should depend on whether agency action has a connection to the public and whether that action results from disciplined consideration.”¹⁷⁰ However, they argue that those values – connection to the public (namely, accountability) and discipline – can be served by courts giving *Chevron* deference only to decisions made by the head of the agency.¹⁷¹ They discuss what a statutory delegate – the officer to whom the agency’s organic statute has granted authority over a given administrative action – must do in order for her decision to get *Chevron* deference.¹⁷² The agency’s decision must bear the delegatee’s name, the delegatee must give a meaningful review to the decision, and she must adopt the decision as her own prior to the final issuance of the decision.¹⁷³ Barron and Kagan argue, “by offering an incentive for certain actors to take responsibility for interpretive choice, the principle advances both accountability and discipline in decision making.”¹⁷⁴ A standard that conditions *Chevron* deference on the decision-making structure, but more particularly, the

¹⁶⁷ Sunstein, *Chevron Step Zero*, *supra* note 3, at 227; *see also* Levin, *supra* note 138, at 794 (criticizing *Mead* for its inconsistency with the policy reasons for *Chevron*, including the agency’s expertise, political accountability and capacity to maintain national uniformity of a program).

¹⁶⁸ Sunstein, *Chevron Step Zero*, *supra* note 3, at 230-31.

¹⁶⁹ Barron and Kagan, *supra* note 125, at 204; *see also* *Mead*, 533 U.S. at 258 (Scalia, J., dissenting) (reasoning that *Chevron* deference should turn on whether the agency’s decision was authoritative); Christensen, 529 U.S. at 591, n.* (Scalia, J., concurring in part and dissenting in part).

¹⁷⁰ Barron and Kagan, *supra* note 125, at 234.

¹⁷¹ *Id.* at 234-57. They reason that the majority in *Mead* could have reached the same result based on the extreme decentralization of the decision-making in the case. *See id.* at 257-58.

¹⁷² *Id.* at 237-40.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 204.

involvement of high-level agency officials in the decision-making, “will encourage high-level officials to assume full and visible responsibility for interpretive rulings, while ensuring that meaningful review lies behind these public acclamations.”¹⁷⁵

III. Examining *Silva-Trevino* at *Chevron* Step Zero

When considering whether *Silva-Trevino* deserves *Chevron* deference, courts first should consider the question at *Chevron* Step Zero – the question of whether the *Chevron* framework applies at all.¹⁷⁶ In this section, I examine the Attorney General’s decision in *Silva-Trevino* under *Mead*. I focus on the importance of procedures to the *Mead* holding. I argue that *Silva-Trevino* should not command *Chevron* deference because, while Congress provided the Department of Justice with authority to use relatively formal procedures,¹⁷⁷ the agency chose the least participatory form of policymaking. In addition, I examine how the agency’s choice of adjudication over rulemaking to announce the new moral turpitude test impacts the *Chevron* step zero question. Finally, I explore whether the *Silva-Trevino* decision’s binding effect and authoritativeness will lead courts to conclude that the *Chevron* framework applies.

A. *The Secretive Process: Fostering Neither Fairness Nor Deliberation*

Was the AG’s decision in *Silva-Trevino* an administrative procedure that “foster[s] the fairness and deliberation that should underlie a pronouncement of such force?”¹⁷⁸ As stated recently by the Third Circuit Court of Appeals, “[t]he unusual circumstances of *Silva-Trevino*’s referral to, and adjudication by, the Attorney General bear mention.”¹⁷⁹ The AG’s opinion was a result of a “secret process” in which he certified the decision to himself without indicating to the parties that he was considering overhauling the categorical approach.¹⁸⁰ When the AG certified Mr. Silva-

¹⁷⁵ *Id.* at 256.

¹⁷⁶ See Sunstein, *Chevron Step Zero*, *supra* note 3, at 191.

¹⁷⁷ See 8 U.S.C. § 1103(g)(2) (“The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General deems to be necessary for carrying out this section.”).

¹⁷⁸ See *Mead*, 533 U.S. at 230.

¹⁷⁹ Jean-Louis, 582 F.3d at 471 n.11.

¹⁸⁰ Reconsideration Memo, *supra* note 58, at 1, 5-6. 8 C.F.R. § 1003.1(h)(i) gives the Attorney General authority to review any decision by the BIA. One issue, which is outside

Trevino's case to himself, neither Mr. Silva-Trevino nor his lawyer received notice of the issues that the AG would consider; nor were they provided with a briefing schedule (albeit fruitless without knowledge of the issues to be considered).¹⁸¹ Attempts by Mr. Silva-Trevino's attorney to inquire about the reason for referral to the AG were unanswered.¹⁸² Because the certification order was not made public, stakeholders were not given the opportunity to give input on this drastic change to immigration law until after the decision was public and therefore binding on all future parties.¹⁸³ A motion to reconsider, which included a lengthy *amicus* brief signed by several immigrants' rights organizations, was promptly rejected in a one-paragraph decision.¹⁸⁴ Thus, *Silva-Trevino* suddenly altered over a century of immigration law without input from either members of the public or the affected party himself.

In deciding *Silva-Trevino*, the agency did not employ the tools at its disposal, i.e., formal procedures, that provide surrogate safeguards for the protections of the Constitution.¹⁸⁵ Formal procedures protect the constitutional right to due process of law, which guarantees persons a right to be heard before they are subjected to the coercive power of the state.¹⁸⁶ In addition, formal procedures maintain constitutional checks and balances among the three branches of government by ensuring transparency, which prevents problems in the lawmaking process such as faction (agency capture by well-organized interest groups) and government self-interest (government actors pursuing their own self-interest to the public detriment).¹⁸⁷ Formal procedures allow affected parties to detect improper motives by government actors or expose agency capture by a well-

of the scope of this article, is whether the regulation permitting the AG to certify BIA decisions to himself is *ultra vires*. 8 U.S.C. § 1101(a)(47)(A) states that removal orders become final upon affirmation by the BIA or expiration of the period in which the respondent may seek review. The regulation at 8 C.F.R. § 1003.1(h)(i), which predated section 1101(a)(47)(A), gives authority to the Attorney General to alter the BIA's decision, notwithstanding the statute's directive that such a BIA decision should be final. Thus, the regulation is inconsistent with the statute and thus is arguably invalid. See *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007) (holding that a regulation that prohibits the filing of a motion to reopen from outside the U.S. is inconsistent with the statute, which allows one motion to reopen, and therefore the regulation lacks authority and is invalid).

¹⁸¹ See *Jean-Louis*, 582 F.3d at 471 n.11; Reconsideration Memo, *supra* note 58, at 1, 5-6.

¹⁸² Reconsideration Memo, *supra* note 58, at 6.

¹⁸³ *Jean-Louis*, 582 F.3d at 471 n.11; Reconsideration Memo, *supra* note 58, at 6.

¹⁸⁴ See Reconsideration Memo, *supra* note 58; *Silva-Trevino* Order, *supra* note 69.

¹⁸⁵ See Sunstein, *Chevron Step Zero*, *supra* note 3, at 225.

¹⁸⁶ See *Merrill and Hicks*, *supra* note 3, at 886.

¹⁸⁷ See *Bressman, Beyond Accountability*, *supra* note 95, at 496-98); Sunstein, *Constitutionalism After the New Deal*, *supra* note 72, at 450.

organized interest group, and thus assign blame to the appropriate agency actors.¹⁸⁸

In *Silva-Trevino*, the Attorney General made a pronouncement of great force¹⁸⁹ through a process that did not embody important constitutional requirement for lawmaking, namely, transparency and careful consideration.¹⁹⁰ No member of the public had any idea that the agency was considering a complete overhaul of the categorical approach before the decision was published.¹⁹¹ Any deliberation that occurred behind the scenes of the AG's decision likely was one-sided, as opponents of the new policy were not given a voice in the discussion.¹⁹² This type of deliberation hardly exudes transparency, as no member of the public knows what type of discussion took place behind closed doors.¹⁹³ Lacking transparency, the decision-making process in *Silva-Trevino* did not allow affected parties to detect improper motives by government actors and assign blame.¹⁹⁴ Therefore, the AG's decision was not "subject to the political control and public scrutiny we demand for agencies as compensation for their lack of direct accountability."¹⁹⁵

¹⁸⁸ See Bressman, *Beyond Accountability*, *supra* note 95, at 506.

¹⁸⁹ See *Mead*, 533 U.S. at 230; see also *Silva-Trevino*, 24 I&N Dec. at 688 ("The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's moral turpitude provisions...My review of this case presents an opportunity to establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied.").

¹⁹⁰ See Bressman, *How Mead Has Muddled*, *supra* note 91, at 1479; Anthony, *Interpretive Rules*, *supra* note 163, at 1373.

¹⁹¹ See Reconsideration Memo, *supra* note 58, at 7.

¹⁹² See *id.* at 4-6.

¹⁹³ In *Home Box Office*, 567 F.2d 9 (D.C. Cir. 1977), the D.C. Circuit reasoned that an agency's reliance on *ex parte* communications after a notice of rulemaking in informal rulemaking was improper because (1) a court cannot assess the truth of the agency's assertions if the knowledge was gained without the benefit of the adversarial process and (2) a court must assess whether the agency's rule is sufficient based on the whole record; *ex parte* communication leaves out a piece of this record. *Id.* at 51-57; see also *id.* at 56 ("Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."); but see *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (refusing to interpret the APA to mandate disclosures that the statute did not clearly require and discussing the benefits of informal communications to agencies). Professor Bressman writes that from a positive political theory standpoint, *ex parte* communications are problematic, "not so much because they imperil basic fairness or allow political compromise to guide agency decisions...[r]ather, they are problematic because they deprive outsiders of access to information about agency action." Bressman, *Procedures as Politics*, *supra* note 148, at 1787.

¹⁹⁴ See Bressman, *Beyond Accountability*, *supra* note 95, at 506.

¹⁹⁵ See Bressman, *How Mead Has Muddled*, *supra* note 91, at 1479.

Which affected parties did the AG exclude from the decisionmaking process, and what considerations would they have brought to the table? First, the AG did not seek input from his own immigration judges on how this decision would impact their workload. The categorical approach developed in immigration law largely out of a desire for administrative efficiency.¹⁹⁶ In fiscal year 2009, the fifty-five immigration courts in the U.S. received 391,829 cases to hear and completed 352,233 such cases;¹⁹⁷ these numbers indicate that each judge completed an average of 1,500 cases.¹⁹⁸ Given the high volume of cases, the categorical approach ensures a more efficient removal hearing.¹⁹⁹

¹⁹⁶ See Pichardo-Sufren, 21 I&N Dec. at 335. However, one circuit court judge, writing in 1971, opined about the introduction of the categorical approach into immigration law:

At the time the rule was first expounded, it is probable that many, if not most, federal administrative agencies were deemed by courts to be incapable of deciding such complex questions as when an act ‘involved moral turpitude’ from the standpoint both of expertise and of proper role. Administrative law has evolved considerably since that time. In contemporary government we are quite prepared to delegate innumerable complicated and subtle questions like this one to administrative agencies. To the extent that the rule was developed because of a then-justified fear of administrative incapacity, an extent which is not revealed by the decisions, it should long since have lost its force.

Marciano v. INS, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting).

¹⁹⁷ Executive Office for Immigration Review (EOIR) Statistical Yearbook, FY 2009, B1-B2, available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

¹⁹⁸ The Honorable Dana Leigh Marks, President of the National Association of Immigration Judges (“NAIJ”), recently stated:

[W]hile the average Federal district judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year (“FY”) 2009, immigration judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges. Under these circumstances, it is not surprising that a recent study found immigration judges suffered greater stress and burnout than prison wardens or doctors in busy hospitals.

Written Statement of Hon. Dana Leigh Marks, President, NAIJ, Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office for Immigration Review (June 17, 2010), available at <http://judiciary.house.gov/hearings/pdf/Marks100617.pdf> (citing *Burnout and Stress Among United States Immigration Judges*, 13 BENDER’S IMMIGR. BULL. 2 (2008) and *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L. J. 57 (2008)). The General Accounting Office in 2006 noted the need for immigration judges to better control their caseload. See Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement, GAO-06-771 (August 11, 2006), available at www.gao.gov/products/GAO-06-771.

¹⁹⁹ See Letter from Carolyn B. Lamm, President, ABA, to Eric H. Holder, Jr. Att’y Gen., 2 (Jan. 22, 2010) [hereinafter “ABA Letter”] (“The categorical approach streamlines the complex immigration system by providing immigration adjudicators with a mechanism to determine the consequences of a criminal conviction by reference only to the criminal

In response to *Silva-Trevino*, the National Association of Immigration Judges issued a statement on the decision's impact on the immigration courts.²⁰⁰ The judges wrote, “[i]n a court system that has been widely recognized as overburdened and lacking sufficient resources, the heightened level of inquiry mandated by *Silva-Trevino* has the potential to cause an inordinate amount of additional work for immigration judges.”²⁰¹ The judges were concerned that the decision “implicates complicated legal arguments in such cases and creates the prospect of a significant amount of additional hearing time to resolve the factual and legal issues it creates...”²⁰² The AG mentioned administrative efficiency in his decision,²⁰³ yet he provided no solution for immigration judges to control their dockets; the decision merely made the empty promise that the new approach was “not an invitation to re-litigate the conviction itself.”²⁰⁴

statute and, in some cases, the criminal court record of conviction.”); *see also* Dulal-Whiteway, 501 F.3d at 132 (“We have emphasized that the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions...It was this very concern about collateral trials, and the oppressive administrative burden they impose, that led the BIA to adopt (and us to endorse) the categorical approach to removability in the first instance.”). In 1996, the BIA summarized the administrative efficiency arguments for using the categorical approach:

[T]he principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction. If we were to allow evidence that is not part of the record of conviction as proof [of deportability], we essentially would be inviting the parties to present and any all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.

Pichardo-Sufren, 21 I&N Dec. at 335.

²⁰⁰ “Impact of *Silva-Trevino* on the Immigration Courts,” Statement of the NAIJ, attached to email from Immigration Judge Denise Slavin, dated April 1, 2010 (on file with author) [hereinafter “NAIJ Statement”].

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See Silva-Trevino*, 24 I&N Dec. at 702.

²⁰⁴ *Id.* at 703. The AG, in a footnote, cited some examples of how judges would apply his new approach. *See id.* at 703 n.3. However, these examples merely reiterate the categorical approach; the AG did not explain what evidence a judge may consider to determine whether an offense involves moral turpitude if the statute is divisible and the record of conviction is not clear. The AG did not discuss, for example, whether a judge should accept a hearsay document (such as a police report) proving that a respondent's offense involves moral turpitude. While the Federal Rules of Evidence do not apply and thus hearsay is not per se barred from immigration court, evidence submitted in removal hearings must be probative and its use must be fundamentally fair. *See Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *In re Barcenas*, 19 I&N Dec. 609, 611 (BIA

Presumably, the AG would concern himself with the workload of immigration judges, as they are Department of Justice employees, yet their concerns were not heard or considered before the publication of *Silva-Trevino*.

The AG also did not seek input from immigrants' rights organizations, who could have foreseen the myriad of problems stemming from the abandonment of the categorical approach, which inevitably leads to the re-litigation of past crimes.²⁰⁵ How would detained, *pro se* respondents in removal proceedings²⁰⁶ re-litigate criminal cases when they are often detained far from where their convictions take place?²⁰⁷ How would *any* respondent re-litigate these cases without the formal rules of evidence,²⁰⁸ Sixth Amendment right to a trial by jury,²⁰⁹ Fourth Amendment

1988). In many cases, using a hearsay document such as a police report would be fundamentally unfair to prove removability. *See id.*; *see also* *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) (reasoning that “highly unreliable hearsay might raise due process problems”). Additionally, if an immigration judge allows a hearsay document into evidence to prove the nature of the crime, the judge also should allow the noncitizen to present testimony or other evidence on the nature of the crime in order to protect the noncitizen’s right to present evidence on his own behalf. *See* 8 U.S.C. §1229a(b)(4). Thus, the only way to circumvent a violation of a respondent’s due process and statutory rights is to engage in what may amount to a retrial of the criminal case in immigration court, which the AG claimed would not happen as a result of his decision in *Silva-Trevino*. *See* *Silva-Trevino*, 24 I&N Dec. at 703.

²⁰⁵ *See* note 204, *supra*.

²⁰⁶ Respondents often are *pro se pro se*, since persons in removal proceedings do not have the right to a court-appointed attorney. *See* 8 U.S.C. § 1229a(b)(4)(A). In addition, many respondents who face removal for a criminal conviction are subject to mandatory detention because of their criminal offenses, which makes it difficult for them to get *pro bono* assistance. *See* 8 U.S.C. § 1226(c); *see also* EOIR Statistical Yearbook FY 2009, *supra* note 197, at G1 (showing that in fiscal year 2009, 176,146 respondents – sixty-one percent of the total number of cases heard by immigration courts – appeared *pro se* in removal proceedings). These factors are exacerbated due to the shorter case calendar for these cases, which gives a detainee even less time to prepare defenses to removal. *See, e.g.*, Immigration Court Practice Manual, § 9.1(e), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (noting that proceedings for detained noncitizens are expedited).

²⁰⁷ *See* ABA Letter, *supra* note 199, at 2 (citing *Huge Increase in Transfers of ICE Detainees*, Transactional Records Access Clearinghouse (Dec. 2, 2009), *available at* <http://trac.syr.edu/immigration/reports/220> and *Immigration and Customs Enforcement Policies and Procedures Relating to Detainee Transfers*, Department of Homeland Security, Office of Inspector General (Dec. 2, 2009), *available at* http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_); *see also* Letter to the Honorable Eric H. Holder from American Immigration Law Foundation (“AILF”) et al re *Silva-Trevino*, 2 (dated March 3, 2009) [hereinafter “AILF Letter”].

²⁰⁸ *See* *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983) (“Administrative proceedings are not, however, bound by strict rules of evidence.”); *In re Rina*, 15 I&N Dec. 453, 455

exclusionary rule²¹⁰ and Fifth Amendment privilege against self-incrimination?²¹¹ How would respondents re-litigate cases that are decades old, yet now form the basis of removal, when witnesses are unavailable, memories have faded, documents have been misplaced and evidence is stale?²¹²

There are other problems arising from *Silva-Trevino* that immigrants' rights groups could have raised during the decisionmaking process. For example, would the decision have a retroactive effect on noncitizens who accepted guilty pleas in reliance on the categorical approach?²¹³ Would the decision wreak havoc on the criminal justice system, since many noncitizens would no longer accept guilty pleas without the predictability of the categorical approach?²¹⁴ Several of these issues

(BIA 1975) (“Those rules [the Federal Rules of Evidence], of course, have no binding effect in administrative deportation hearings.”).

²⁰⁹ See *Dulal-Whiteway*, 501 F.3d at 132 (“[I]t goes without saying that there is no Sixth Amendment right to a jury determination of removability.”).

²¹⁰ The Supreme Court has stated, in dicta, that the exclusionary rule may only apply in immigration proceedings if there has been an egregious violation of the Fourth Amendment. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

²¹¹ See *In re R*, 4 I&N Dec. 720, 721 (BIA 1952) (“The fifth amendment to the Constitution of the United States protects a witness testifying in deportation proceedings from giving evidence which would tend to show his guilt under a Federal criminal statute. Where there is no such showing, an alien may be compelled to testify.”).

²¹² See ABA Letter, *supra* note 199; AILF Letter, *supra* note 207, at 2. Since there is no statute of limitations on most criminal grounds of removal, a removal hearing can be based on a conviction where the events in question occurred years ago. See, e.g., *In re Lettman*, 22 I&N Dec. 365 (BIA 1998) (holding that a noncitizen convicted of an aggravated felony is subject to deportation regardless of the date of the conviction when the alien is placed in deportation proceedings on or after March 1, 1991, and the crime falls within the aggravated felony definition).

²¹³ See *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984) (“an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests”); *Chenery II*, 332 U.S. at 203 (holding that an agency may give retroactive force to a new rule created through administrative action, but “the retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-953 (9th Cir. 2007) (holding that the BIA’s new rule, announced in an adjudication, that drug trafficking crimes are *per se* “particularly serious crimes” that bar an applicant from protection from persecution under 8 U.S.C. § 1231(b)(3) was impermissibly applied retroactively to the respondent in the case); see also *Retail Wholesale & Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972) (establishing five-factor balancing test for determining whether an agency impermissibly applied an adjudicatory decision to a party).

²¹⁴ This question is of considerable importance in light of the Supreme Court’s 2010 decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that it was ineffective assistance of counsel for a defense attorney to fail to advise a noncitizen about the immigration consequences of a guilty plea. See *id.* at 1482-83; see also *INS v. St. Cyr*,

could have been more thoroughly explored, if, prior to the publication of *Silva-Trevino*, the Attorney General had reached out to groups such as immigrants' rights organizations,²¹⁵ the American Bar Association²¹⁶ or his own immigration judges.²¹⁷ Had the agency used formal procedures, it could have guaranteed "the fairness and deliberation that should underlie a pronouncement of such force"²¹⁸ by "giving people an opportunity to be heard and offering reasoned responses to what people have to say."²¹⁹

The *Silva-Trevino* decision-making process highlights Professor Bressman's argument that procedures perform an important role in Congressional oversight of agencies, which is why the Supreme Court placed such value on procedures in *Mead*.²²⁰ Congress monitors immigration agencies through "fire alarm" oversight;²²¹ it relies on private parties to gather information and notify Congress of proposed changes to regulatory practice.²²² Administrative procedures allow constituents a role in the agency's decision-making process, so that constituents can alert Congress to changes long before the agency irreversibly alters the status quo.²²³ In the *Silva-Trevino* decision-making process, immigrants' rights organizations, the ABA and immigration judges could have alerted Congress that the agency was considering an overhaul of the categorical approach.²²⁴ In light of the cost and due process concerns raised, Congress

533 U.S. 289, 323 n.50 (2001) (reasoning that "competent defense counsel, following the advice of numerous practice guides," would advise a noncitizen about the immigration consequences of a guilty plea). The categorical approach allows attorneys to more accurately predict the immigration consequences of a guilty plea. See ABA Letter, *supra* note 199, at 3 (stating that under *Silva-Trevino*, "defense attorneys are unable to reliably predict the immigration consequences of contemplated dispositions. The resulting uncertainty will make fewer immigrant defendants willing to enter into plea agreements, thereby increasing the number of trials and imposing a substantial new burden on the criminal justice system as a whole."). Circuit courts have reasoned that the categorical approach jurisprudence in immigration law "has provided predictability, enabling aliens to better understand the immigration consequences of a particular conviction." Jean-Louis, 582 F.3d at 482; see also *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004 (9th Cir. 2008).

²¹⁵ See Reconsideration Memo, *supra* note 58; see also AILF Letter, *supra* note 207.

²¹⁶ See ABA Letter, *supra* note 199 (urging Attorney General Holder to withdraw AG Mukasey's decision in *Silva-Trevino*); ABA RESOLUTION 113: PRESERVING THE CATEGORICAL APPROACH IN IMMIGRATION ADJUDICATIONS (Aug. 4, 2009) [hereinafter "ABA Resolution"].

²¹⁷ See NAIJ Statement, *supra* note 200.

²¹⁸ See *Mead*, 533 U.S. at 230.

²¹⁹ See Sunstein, *Chevron Step Zero*, *supra* note 3, at 225.

²²⁰ See Bressman, *Chevron's Mistake*, *supra* note 86, at 570.

²²¹ *Id.* (citing McCubbins and Schwartz, *supra* note 143, at 166).

²²² *Id.*

²²³ See *id.*

²²⁴ See AILF Letter, *supra* note 207; ABA Letter, *supra* note 199; ABA Resolution, *supra* note 216; NAIJ Statement, *supra* note 200; Reconsideration Memo, *supra* note 58.

may have decided to entrench the categorical approach by amending the INA.²²⁵ Yet, these groups did not have the opportunity to comment until *after* the decision was a *fait accompli*.²²⁶ Even a mere notice to Mr. Silva-Trevino about the issues that the AG would consider, or a request for *amicus* briefing on the issue, would have allowed requisite political participation to ensure adequate Congressional oversight.²²⁷

The *Silva-Trevino* decision-making process also highlights scholars' argument that courts should take cues from the agency by the procedures it uses and provide deference accordingly.²²⁸ Professor Stephenson, explaining *Mead*'s rationale, states: "courts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency's mission or the degree to which the agency's judgment reflects a sensible balancing of the relevant considerations."²²⁹ Thus, agencies that want to advocate a more aggressive reading of a statute "must decide whether it is worth paying the costs associated with formal procedures in order to 'purchase' greater judicial toleration of a more aggressive interpretation of the statute."²³⁰ The AG in *Silva-Trevino* advocated for an aggressive interpretation of the statute, one that changed years of case law.²³¹ Yet, the agency, by using such paltry procedures, gave the signal to courts that the new moral turpitude test is of limited importance, and certainly not important enough to spend money writing regulations or even asking for outside input in an adjudication.²³² Thus, courts should provide a check on the agency's actions in *Silva-Trevino*; because the agency acted expeditiously and informally, courts should not confer *Chevron* deference.²³³ Had the agency followed formal procedures, these procedures would have provided their own checks on the agency action, so a court could more easily defer to the decision.²³⁴

²²⁵ *See id.*

²²⁶ *See* Reconsideration Memo, *supra* note 58, at 7-11.

²²⁷ *See* Bressman, *Procedures as Politics*, *supra* note 148, at 1785. In other important immigration decisions, the BIA has requested briefing from immigrants' rights organizations. *See* Reconsideration Memo, *supra* note 58, at 8-9 (citing *In re Soriano*, 21 I&N Dec. 516 (AG 1997) and *In re Hernandez-Casillas*, 20 I&N Dec. 262 (AG 1990), as examples of cases in which prior attorneys general sought input from the public in the form of *amicus* briefs).

²²⁸ *See, e.g.*, Stephenson, *supra* note 93, at 547-48; Sunstein, *Chevron Step Zero*, *supra* note 3, at 225-26.

²²⁹ Stephenson, *supra* note 93, at 530-31.

²³⁰ *Id.* at 531.

²³¹ *See* *Silva-Trevino*, 24 I&N Dec. at 690, 696-704.

²³² *See* Reconsideration Memo, *supra* note 58, at 7-11.

²³³ *See* Sunstein, *Chevron Step Zero*, *supra* note 3, at 225-26.

²³⁴ *See id.*

B. *The Choice of Adjudication Over Rulemaking*

In *Silva-Trevino*, the AG chose to overhaul the categorical approach through adjudication instead of notice-and-comment rulemaking. Adjudication has its advantages in that it is more efficient and less costly to the agency; the agency also can frame the issues more narrowly in adjudication.²³⁵ The Supreme Court has held that the agency has wide discretion to choose between rulemaking and adjudication.²³⁶ However, courts need not give *Chevron* deference to the end product of that choice of policymaking form;²³⁷ rather, *Mead* announced a rule that “structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied.”²³⁸

There are good reasons for a reviewing court to decide, in the case of *Silva-Trevino*, that “the choice of adjudication over rulemaking for making policy [was] significant if not suspect.”²³⁹ First, the categorical approach that the Attorney General upended was well-entrenched; noncitizens had relied substantially and in good faith on the

²³⁵ See Magill, *supra* note 91, at 1397.

²³⁶ See *Chenery II*, 332 U.S. at 203. The Court also has held that adjudications should command *Chevron* deference in the same manner that rulemaking commands deference. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

²³⁷ See Magill, *supra* note 91, at 1425 (“an agency can choose its form...but it does not choose what follows from that choice. What follows- the process the agency must follow; the legal effect of its action; and whether, when and under what the standard the action can be challenged in court – are fixed by other sources of law.”); see also *id.* at 1405 (explaining the *Chenery II* principle, which is an “otherwise puzzling judicial reaction to agency choice of procedure” by arguing that “because the judiciary has indirect opportunities to shape the consequences of an agency’s choice of form, it need not directly evaluate the choice of form in any given case.”).

²³⁸ *Id.* at 1431.

²³⁹ See Bressman, *Beyond Accountability*, *supra* note 95, at 536. Professor Bressman discusses the *Chenery II* decision, in which the Court stated that agencies have broad discretion to choose procedures; however, she notes that *Chenery II* was decided in 1947, when agencies hardly used rulemaking. Today, she argues, “agencies now routinely use rulemaking, which makes the choice of adjudication over rulemaking for making policy significant if not suspect.” Bressman, *Beyond Accountability*, *supra* note 95, at 535-36; see also *id.* at 537 (“*Mead*...begins a partial weaning from *Chenery II* and unlimited choice of procedures. As such, it shows that administrative law has begun to record a concern for arbitrariness in this area.”); see also Magill, *supra* note 91, at 1384-85 (“In the 1950s and 1960s, most administrative agencies implemented their statutes by deciding individual cases; by the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules.”).

previous interpretation, which had existed for over a century.²⁴⁰ Also, the new policy announced in *Silva-Trevino* is not context-specific or so specialized that it is impossible to capture in a rule.²⁴¹ Rather, the agency wished to create a new framework for deciding all moral turpitude cases, not just cases with facts similar to Mr. Silva-Trevino's.²⁴² When, as in *Silva-Trevino*, the agency is considering a ruling that is both well-entrenched and not context-specific, it is preferable to make policy by rulemaking, "rather than by picking a sacrificial lamb and making policy through adjudication."²⁴³

The AG chose adjudication to announce the overhaul of the categorical approach, but did he respect the elements of the form of policymaking he chose?²⁴⁴ The APA does not govern removal proceedings,²⁴⁵ therefore, the adjudication in *Silva-Trevino* does not fall squarely into the box of a "formal" or "informal" adjudication.²⁴⁶ However, it clearly was an adjudication affecting liberty interests and therefore must comply with the requirements of due process.²⁴⁷ Consistent with the notions of due process, parties should be given notice of the potential change in law and allowed to brief the issues; the adversarial system allows both parties to present arguments to a neutral adjudicator and contest their opponents' arguments.²⁴⁸ The agency must respond to each argument in order to pass judicial scrutiny under the reasoned decision-making

²⁴⁰ See *Bell Aerospace*, 416 U.S. at 295; *Pfaff v. U.S. Dep't of Housing and Urban Development*, 88 F.3d 739, 748 n.4 (9th Cir. 1996) ("Adjudication is best suited for incremental developments to the law, rather than great leaps forward."); Magill, *supra* note 91, at 1424.

²⁴¹ See *Bell Aerospace*, 416 U.S. at 294; *Chenery II*, 332 U.S. at 202-03; Magill, *supra* note 91, at 1424.

²⁴² See *Silva-Trevino*, 24 I&N Dec. at 689 ("[T]his opinion establishes an administrative framework for determining whether an alien has been convicted of a crime involving moral turpitude.").

²⁴³ See Magill, *supra* note 91, at 1424.

²⁴⁴ See *id.* at 1410-11 ("[A]n agency is generally free to choose among all of its available policymaking forms and, as long as the agency respects the elements of the form it has chosen, its choice of preferred form will not be directly evaluated by courts.").

²⁴⁵ See *Marcello v. Bonds*, 349 U.S. 302, 310 (1954) (reasoning that the legislative history of the INA indicates a desire by Congress to incorporate some, but not all, of the procedural protections of the APA into the INA).

²⁴⁶ See note 97, *supra*, for a description of the procedural differences between formal and informal adjudications.

²⁴⁷ See *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

²⁴⁸ See *Chike v. INS*, 948 F.2d 961 (5th Cir. 1991) (due process violation found when pro se respondent in deportation hearing was not given notice of the BIA's briefing schedule and the government was allowed to file a brief); *Reconsideration Memo*, *supra* note 58, at 7-8.

requirement.²⁴⁹ Thus, in adjudications, “public input is ensured, and the agency has a substantial incentive to be responsive to that input.”²⁵⁰ While public input is not guaranteed in the same manner as in notice-and-comment rulemaking,²⁵¹ stakeholders often have opportunity for input through *amicus* briefs, either requested by the agency²⁵² or by a party to the adjudication.²⁵³

²⁴⁹ The “reasoned decision-making requirement” or “hard look doctrine,” requires the agency to explain its reasons enough to determine whether its decision was arbitrary and capricious. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 407-08, 420 (1971) (remanding a decision to approve construction of a highway through a park because the agency did not state the reasons for choosing that particular route and holding that the agency must offer “some explanation” to allow the court to determine whether “the [agency] acted within...[its] authority and if the [agency’s] action was justifiable under the applicable standard”); see also *State Farm*, 463 U.S. at 43 (applying the reasoned decision-making requirement to notice-and-comment rulemaking and defining an agency decision that was arbitrary and capricious as one that 1) relied on factors Congress did not intend it to consider; 2) entirely failed to consider an important aspect of the problem; 3) offered an explanation for decision-making that runs counter to evidence before the agency; or 4) was so implausible that it cannot be ascribed to a difference in view or product of agency expertise); Bressman, *Beyond Accountability*, *supra* note 95, at 476 (discussing that the passage of the APA in 1946 allowed judges to seize on the “arbitrary and capricious” standard of review contained therein and require agencies to produce a record reflecting consideration of all relevant issues to facilitate judicial review). Because the agency’s decision must not be arbitrary and capricious, the agency must anticipate problems with its reasoning. Scholars argue that the best way to anticipate such problems is to open up the process to challengers before the decision is final; formal procedures facilitate this crucial input from the public. See, e.g., Bressman, *Procedures as Politics*, *supra* note 148, at 1781.

²⁵⁰ Merrill and Hickman, *supra* note 3, at 885.

²⁵¹ See *id.* at 886 (“At a minimum, at least one interested party will exist to act as the virtual representative of other similarly situated persons.”).

²⁵² For example, in *Wyman-Gordon*, the Supreme Court discussed how the NLRB had “invited certain interested parties” to file briefs and participate in oral arguments prior to its ruling in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), which set forth a new policy requiring employers to provide unions with lists of names of employees before elections. See *Wyman-Gordon*, 394 U.S. at 762-63 (quoting *Excelsior Underwear*, 156 N.L.R.B. at 1238); see also *Reconsideration Memo*, *supra* note 58 at 8-9 (citing *In re Soriano*, 21 I&N Dec. 516, and *In re Hernandez-Casillas*, 20 I&N Dec. 262, as examples of cases in which prior attorneys general sought input from the public in the form of *amicus* briefs).

²⁵³ See Merrill and Hickman, *supra* note 3, at 886. Professor Magill writes:

As courts encouraged and embraced notice-and-comment rulemaking as a policymaking tool, the exclusion of parties from adjudication began to look anachronistic. Instead of requiring agencies to rely on rulemaking under certain circumstances, the courts recognized participation rights for parties who were interested in (but were not the objects of) adjudications and thus made some adjudications look a little bit more like rulemaking.

Magill, *supra* note 91, at 1440.

Silva-Trevino is an example of adjudication in its least participatory form. The basic requirements for due process were not met. Mr. Silva-Trevino was given no notice of the potential change in law;²⁵⁴ moreover, it is highly likely that Mr. Silva-Trevino's opponents, in *ex parte* communications with the office of the Attorney General,²⁵⁵ were allowed to make their case without an opposing party present.²⁵⁶ The AG did not ask for any briefing from interested stakeholders; nor could Mr. Silva-Trevino ask for *amici* to weigh in because he did not know that the AG was considering a major overhaul of the categorical approach until after the publication of the decision.²⁵⁷ Adjudication at its best can be closer to the deliberation that occurs in notice-and-comment rulemaking.²⁵⁸ Adjudication at its worst, i.e., *Silva-Trevino*, should command less deference from courts because of the due process violations to the individual and the lack of deliberation by the agency.²⁵⁹

²⁵⁴ See Reconsideration Memo, *supra* note 58 at 7.

²⁵⁵ Reconsideration Memo, *supra* note 58, at 9 (“[I]t appears highly likely that the certification process in this case began with some *ex parte* communication with the Attorney General.”); see also *id.* at 10 (“[T]here is a troubling possibility that the certification process in this case may have been used by the Office of Immigration Litigation to shore up its litigation positions in court.”).

²⁵⁶ In immigration cases, the APA's strict prohibition on *ex parte* communication in adjudications does not apply because the APA does not apply to removal proceedings. See 5 U.S.C. §§ 554(d), 557(d); Marcello, 349 U.S. at 310. However, the due process clause of the Fifth Amendment guarantees a neutral judge. See *Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005). In a challenge to the use of *ex parte* communications in the immigration context, the District Court for the Middle District of Pennsylvania stated:

The decisions of EOIR adjudicators are entitled to a ‘presumption of regularity,’ and a party alleging irregularity bears the burden of proving it...Consequently, in order to warrant a hearing on their claim of political interference and *ex parte* communications, Petitioners must make a ‘strong showing’ of impropriety by administrative officials.

Yi v. Reno, 925 F. Supp. 320, 330 (M. D. Pa. 1996) (citing *McLeod v. INS*, 802 F.2d 89, 95 n.8 (3d Cir. 1986) and *Citizens to Preserve Overton Park*, 401 U.S. at 420).

In *Sierra Club*, Judge Patricia Wald reasoned that *ex parte* communications are permissible in rulemaking because “our form of government could not function efficiently or rationally if key executive policymakers were isolated from each other and from the Chief Executive.” *Sierra Club*, 657 F.3d at 300. However, Judge Wald reasoned that one instance where it is necessary to reveal *ex parte* communications is when “such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings” because “there is no inherent executive power to control the rights on individuals in such settings.” *Id.* at 303.

²⁵⁷ Reconsideration Memo, *supra* note 58, at 6.

²⁵⁸ See Magill, *supra* note 91, at 1440; see also *id.* at 1397 (noting that there is often a more extensive vetting of views if the agency presents its view to an administrative tribunal).

²⁵⁹ In *Alaska Dep’t of Health and Social Servs. v. Ctrs. For Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005), the Ninth Circuit examined an agency’s adjudication

It would go too far to suggest that the *Silva-Trevino* decision only merits *Chevron* deference if the agency followed the strict requirements of notice-and-comment rulemaking.²⁶⁰ In *Mead*, the Court did not require agencies to use the most formal procedures to command *Chevron* deference;²⁶¹ standard procedures such as notice-and-comment rulemaking and adjudication are mere examples of the types of procedures that are acceptable to guarantee *Chevron* deference.²⁶² Professor Bressman states, “unmitigated formalism is neither necessary or wise...We instead should afford Congress or agencies a little leeway to create administrative lawmaking procedures beyond trial-type or paper hearings.”²⁶³ However, courts should “require that those procedures adhere to certain specified limits – in particular, that the resulting policy is transparent, rational, and binding.”²⁶⁴ As the decision-making process in *Silva-Trevino* was neither transparent, nor its results rational, the decision should not merit *Chevron* deference.

C. Can *Silva-Trevino* Survive Step Zero?

Courts reviewing *Silva-Trevino* have adequate reasons to decide that the decision passes *Chevron* step zero. First, the AG’s decision in *Silva-Trevino* has binding effect on future parties.²⁶⁵ *Silva-Trevino* was published and thus precedent-setting,²⁶⁶ making its binding effect “immediate and

under *Mead* and conferred *Chevron* deference to the decision because of the multiple opportunities for participation by the parties and deliberation by the agency. *Id.* at 939. The court stated:

Here, the formal administrative process afforded the State included the opportunities to petition for reconsideration, brief its arguments, be heard at a formal hearing, receive reasoned decisions at multiple levels of review, and submit exceptions to those decisions. These hallmarks of ‘fairness and deliberation’ are clear evidence that Congress intended the Administrator’s final determination to ‘carry the force of law.’

Id.

²⁶⁰ See Bressman, *Beyond Accountability*, *supra* note 95, at 535 (discussing scholars’ praise for notice-and-comment rulemaking to set policy, but observing “when push comes to shove, few scholars want to reduce agency flexibility”); Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, *supra* note 76, at 46 (“It is manifestly too late in the day to suggest that *Chevron* acceptance should apply only to interpretations embodied in legislative rules.”).

²⁶¹ See *Mead*, 533 U.S. at 227.

²⁶² Bressman, *How Mead Has Muddled*, *supra* note 91, at 1450.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See, e.g., Levin, *supra* note 138, at 774-75.

²⁶⁶ The regulation provides:

irrevocable until officially renounced.”²⁶⁷ The decision’s binding effect distinguishes it from the tariff ruling letter at issue in *Mead*, for which the “binding character as a ruling stop[ped] short of third parties.”²⁶⁸ While other importers were warned against assuming any right of detrimental reliance on the tariff ruling letter in *Mead*,²⁶⁹ any noncitizen facing CIMT charges is subject to the AG’s new approach.²⁷⁰

Binding effect is also “the promise of consistent application.”²⁷¹ One might question how *Silva-Trevino* promises consistent application, due to the decision’s clear inconsistency with over a century of practice.²⁷² Yet, this type of change in agency position should merit the same level of deference as an original agency interpretation. The Supreme Court in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*²⁷³ held that “[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”²⁷⁴ The Court reasoned, “for if the agency adequately explains the reasons for a reversal of policy, ‘change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.’”²⁷⁵ While the AG significantly changed immigration law, he explained his reasons for doing so, anticipating some of his opponents’ arguments and rebutting them in a lengthy decision.²⁷⁶

Notwithstanding these considerations, the *Silva-Trevino* decision should not survive *Chevron* step zero. The decision’s binding effect alone should not be enough to create the “force of law.”²⁷⁷ Merely calling the decision precedent does not automatically confer *Chevron* deference; the *Mead* Court stated: “precedential value alone does not add up to *Chevron*

By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

8 C.F.R. § 1003.1(g).

²⁶⁷ See Bressman, *How Mead Has Muddled*, *supra* note 91, at 1488-89.

²⁶⁸ See *Mead*, 533 U.S. at 233.

²⁶⁹ See *id.* at 233 (citing 19 C.F.R. § 177.9(c)).

²⁷⁰ See *Silva-Trevino*, 24 I&N Dec. at 688; see generally Tooby and Kesselbrenner, *supra* note 45.

²⁷¹ Bressman, *How Mead Has Muddled*, *supra* note 91, at 1488-89.

²⁷² See *Silva-Trevino*, 24 I&N Dec. at 688-704; Mylius, 201 F. at 863.

²⁷³ 545 U.S. 967 (2005).

²⁷⁴ See *id.* at 981.

²⁷⁵ *Id.* (citing *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 742 (1996)).

²⁷⁶ See *Silva-Trevino*, 24 I&N Dec. at 688-704.

²⁷⁷ See Merrill, *supra* note 126, at 817.

entitlement.”²⁷⁸ Reflecting on this sentence from the *Mead* decision, Professor Merrill states, “[t]his would seem to negate any claim that authority to articulate a rule of decision is a *sufficient* condition of power to act with the force of law.”²⁷⁹

Why is declaring an agency decision precedent insufficient to create the “force of law?” In the context of agency adjudication, precedential value does not confer the “force of law” in the same manner as court-made precedential case law. Professor Richard Murphy has noted, “[t]he law-like quality of case-law flows from precedential force; one should expect an interpretation of law adopted in a given case to function as law in later cases precisely because *stare decisis* requires courts to defer to past judicial opinions.”²⁸⁰ As underscored by the Supreme Court’s decision in *Brand X*, an agency, unlike a court, can easily alter well-settled precedent, “provided that its explanation for its departure can survive judicial review for arbitrariness. Because agency ‘precedents’ do not bind later agency decision-making in any serious way, they do not possess the same potential as judicial precedents to create generally applicable and binding law.”²⁸¹ In *Silva-Trevino*, the AG suddenly reversed years of case law, invoking *Brand X* to remind challengers that agencies can change their minds.²⁸² The ease with which he could make such a change conflicts with the “rule-of-law idea that regulated parties ought to be able to identify the law and to expect that it will persist for some reasonable period of time.”²⁸³

Moreover, the decision is binding in name only, as the AG did not “exercise [his lawmaking] authority in ways that generally promote consistency and specifically prevent ad hoc departures at the behest of

²⁷⁸ See *Mead*, 533 U.S. at 232 (reasoning that interpretive rules may sometimes function as precedents, but are not accorded *Chevron* deference “as a class”).

²⁷⁹ See Merrill, *supra* note 126, at 817 (emphasis in original).

²⁸⁰ Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L. J. 1013, 1042 (2005) [hereinafter Murphy, *Judicial Deference*].

²⁸¹ *Id.* Professor Murphy argues for a “commitment theory,” under which courts should give *Chevron* deference to agency decisions that reflect a longstanding commitment or those that are difficult for the agency to change in the future (because, for example, the agency interpretation was promulgated through notice-and-comment rulemaking, which would require new rulemaking to change). See *id.* at 1065. Agency interpretations announced in formal adjudications do not have the promise of consistent application because they can be amended cheaply by the agency “with little or no procedural ado.” *Id.* at 1071. Therefore, he disagrees with the majority in *Mead* that formal adjudications should receive *Chevron* deference. See *id.* at 1071-72.

²⁸² See *Silva-Trevino*, 24 I&N Dec. at 689.

²⁸³ See Murphy, *Judicial Deference*, *supra* note 280, at 1026; see also Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1040-41 (2007) (arguing that post-*Brand X*, agencies will have great difficulty persuading private parties to rely on agency interpretations).

narrow interests.”²⁸⁴ Professor Bressman writes, “[b]y announcing a rule that binds all similarly situated parties, agencies may stem requests for deviations except through official channels.”²⁸⁵ As noted by the *amici* who asked the AG to reconsider his decision in *Silva-Trevino*, it appears that the AG abandoned the traditional categorical approach upon request of the Office of Immigration Litigation (“OIL”) of the Department of Justice, which wanted to shore up its litigation positions in court.²⁸⁶ It appears that OIL was permitted to request a deviation from prior case law through unofficial channels, namely, *ex parte* communication.²⁸⁷ The agency’s sudden abrupt departure from over a century of case law seemed to be tailored to the narrow interests of OIL, without considering the views of the many others whom the decision impacted.²⁸⁸

Another reason for courts to give deference to *Silva-Trevino* is because the decision was authoritative: it “represent[s] the official position of the expert agency.”²⁸⁹ The decision was rendered by the head of the Department of Justice,²⁹⁰ thus distinguishing it from decisions such as the tariff letters in *Mead*, which were written by low-level agency officials who did not have the same authority over agency policy.²⁹¹ The *Silva-Trevino*

²⁸⁴ Bressman, *Beyond Accountability*, *supra* note 95, at 539; see also Bressman, *How Mead Has Muddled*, *supra* note 91, at 1479-80 (“The Constitution...demands consistent application, as evident by Article I, the Due Process Clause, and elsewhere. Thus, it requires procedural formalities to promote predictable and fair lawmaking, not simply accountable lawmaking.”).

²⁸⁵ Bressman, *Beyond Accountability*, *supra* note 95, at 539.

²⁸⁶ See Reconsideration Memo, *supra* note 58, at 10. The agency’s attempt to look behind the record of conviction already had met some resistance in the circuit courts; for example, the Second Circuit rejected the BIA’s decision in *Gertsenshteyn*, which allowed for a factual inquiry into whether a prostitution aggravated felony offense was committed for commercial advantage. See *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 147-49 (2d Cir. 2008). The Second Circuit stated: “[t]hat the Government finds that task [proving removability through the use of the record of conviction] difficult in some cases is no reason for immigration courts to renounce the restrictions that the courts have said the law requires.” *Id.* at 148.

²⁸⁷ See Reconsideration Memo, *supra* note 58, at 10.

²⁸⁸ See Bressman, *Beyond Accountability*, *supra* note 95, at 539; see also AILF Letter, *supra* note 207; ABA Letter, *supra* note 199; ABA Resolution, *supra* note 216; NAIJ Statement, *supra* note 200; Reconsideration Memo, *supra* note 58.

²⁸⁹ See Christensen, 529 U.S. at 591 n.* (Scalia, J., concurring).

²⁹⁰ In their article *Chevron’s Nondelegation Doctrine*, Barron and Kagan illustrate their argument that only authoritative decisions should receive *Chevron* deference by using as an example the Attorney General deciding an immigration law issue. See Barron and Kagan, *supra* note 125, at 262-63 (citing *Aguirre-Aguirre*, 526 U.S. at 425) (recognizing that this argument is inconsistent with *Aguirre-Aguirre*, in which the Court held that the BIA has power to give meaning to immigration statutory terms because the AG has vested the BIA with such power).

²⁹¹ See *Mead*, 533 U.S. at 233-34.

decision set forth a uniform policy to alter the behavior of regulated individuals; it was not one of thousands issued per year by low-level agency officials.²⁹² Not only did the AG have the authority to make policy, but he clearly intended to exercise this authority to establish a new framework for determining whether an offense involves moral turpitude.²⁹³ Scholars, including Justice Kagan, have argued that the authority of the decision-maker alone is sufficient to command *Chevron* deference;²⁹⁴ their arguments find support in Justice Scalia's dissenting opinion in *Mead*.²⁹⁵

Justice Kagan and Professor Barron argue that courts should grant *Chevron* deference only if the head of the agency made the decision, as this approach promotes "accountability and discipline in decision-making."²⁹⁶ *Silva-Trevino*, however, is a case that disproves this theory. Accountability is not served by awarding *Chevron* deference to the head of the agency when he acts on behalf of an administration that already has been voted out of office.²⁹⁷ A "midnight adjudication" such as *Silva-Trevino* presents a

²⁹² See *id.* ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is imply self-refuting."). Professor Merrill, citing the *Mead* Court's reasoning that a system that generates thousands of tariff classifications each year from different ports of entry with no systemic effect at coordination, states, "[t]he thought here seems to be that a delegation to an agency to act with the force of law will usually generate *uniform* rules throughout the agency's jurisdiction. A regulatory system unconcerned with whether like cases are treated alike is an unlikely candidate for the appellation 'law.'" Merrill, *supra* note 126, at 817.

²⁹³ See *Silva-Trevino*, 24 I&N Dec. at 688 ("This opinion establishes an administrative framework for determining whether an alien has been convicted of a crime involving moral turpitude."); *cf.* *Mead*, 533 U.S. at 307 ("It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these."). Professor Koch discusses what he sees as two core questions that the *Mead* Court answered: first, did Congress delegate authority to make policy to the agency, and second, did the agency intend to exercise its policy-making function. The Court answered the first question in the affirmative, and the second in the negative. See Charles H. Koch, *Judicial Review of Agency Policymaking*, 44 WM AND MARY L. REV. 375, 398 (2002). Unlike the agency in *Mead*, the AG, deciding *Silva-Trevino*, intended to exercise his policy-making function.

²⁹⁴ See Barron and Kagan, *supra* note 125, at 229.

²⁹⁵ See *Mead*, 533 U.S. at 258 (Scalia, J., dissenting); see also Christensen, 529 U.S. at 591, n.* (Scalia, J., concurring).

²⁹⁶ See Barron and Kagan, *supra* note 125, at 204.

²⁹⁷ See Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N. Y. U. L. REV. 557, 566-67 (2003). Professor Mendelson reasons that rulemaking occurring late in an administration can promote accountability because the electorate can participate in the notice-and-comment rulemaking process. See *id.* at 636. She argues that such "midnight rulemaking" raises the issue's visibility, which arguably creates more public debate than the traditional notice-and-comment rulemaking process, in which primarily well-organized interest groups participate. See *id.* at 635-36. She argues, however, that "[o]ther forms of policy entrenchment may lack significant potential to create dialogue, and, moreover, because of their lack of procedural discipline

great risk of abuse of power by an outgoing administration;²⁹⁸ the AG purposely could have chosen *not* to commence notice-and-comment rulemaking, which would have lasted long enough to spill over into the next administration and allow opposing views to dictate the results.²⁹⁹ As Professor Jack Beerman has stated, “[a]s the end of a term nears, the political costs of taking action may decrease, which may free an administration to take action that it could not have taken earlier in its term...[n]ear the end of a term, political costs and benefits may be less important to the administration...”³⁰⁰ Thus, AG Mukasey could “assume full and visible responsibility”³⁰¹ for the *Silva-Trevino* ruling; yet, he suffered no repercussions, since he knew at the time of publication that his days as Attorney General were numbered.³⁰²

The AG’s decision also lacked discipline, as there was insufficient deliberation that preceded *Silva-Trevino*’s publication.³⁰³ As discussed in Part IIIA, the AG concluded that his decision would not lead to the re-litigation of past crimes; this error led him to inadequately weigh concerns such as administrative efficiency.³⁰⁴ This flaw in reasoning was not the only error of law contained in the opinion.³⁰⁵ Perhaps the AG did not have

and their narrow focus, coupled with the lack of electoral accountability, they may present a greater risk of abuse.” *Id.* at 658.

²⁹⁸ *See id.* at 658.

²⁹⁹ *See* Masur, *supra* note 283, at 1069 (discussing why outgoing administrations do not have time to initiate notice-and-comment rulemaking between the election results and the new administration, which is why the “prototypical ‘eleventh hour’ executive actions are those that the President can undertake unilaterally and instantaneously”).

³⁰⁰ Jack M. Beerman, *Presidential Power in Transitions*, 83 B. U. L. REV. 947, 958 (2003).

³⁰¹ *See* Barron and Kagan, *supra* note 125, at 256.

³⁰² *See* Beerman, *supra* note 300, at 958.

³⁰³ *See* Barron and Kagan, *supra* note 125, at 204.

³⁰⁴ *See* notes 196-99, *supra*, and accompanying text.

³⁰⁵ For example, the AG discussed a “patchwork” of circuit court decisions on the use of the categorical approach; in the name of the uniform application of immigration law, he wished to create one approach to the CIMT analysis with his decision in *Silva-Trevino*. *See* *Silva-Trevino*, 24 I&N Dec. at 694. Most of the cases cited by the AG demonstrated a circuit split on when an immigration adjudicator could look at the record of conviction and when a statute was actually divisible. *See* *Jean-Louis*, 582 F.3d at 474 n. 16 (“Although courts employ different labels to describe the categorical and modified categorical approaches, the fundamental methodology is the same.”). In only one outlier case, *Ali*, had a court permitted an adjudicator to look behind the record of conviction. *See* *Silva-Trevino*, 24 I&N Dec. at 693-94; *Ali*, 521 F.3d at 743 (holding that an immigration judge can consider evidence outside of the record of conviction to determine whether an offense is a crime involving moral turpitude); see also Reconsideration Memo, *supra* note 58, at 19 n.12 (questioning the validity of the *Ali* decision because it was a panel decision that conflicted with prior panel decisions and noting the flaws in the *Ali* court’s reasoning). The *amici* who challenged the *Silva-Trevino* decision stated:

time to adequately deliberate because the *Silva-Trevino* decision was rushed out during the final days of the Bush administration,³⁰⁶ in attempts to entrench the new policy before the opposing party took office.³⁰⁷ Perhaps the AG's decision lacked meaningful review because he did not believe that his sense of professional responsibility and importance were at stake if he indiscriminately signed off on the decision.³⁰⁸ Perhaps the decision lacked accuracy and thoroughness due to the AG's failure to "invite and consider comments of the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis."³⁰⁹ Regardless of the cause, the AG's opinion in *Silva-Trevino*, while authoritative, was not disciplined.

Why should courts care about the discipline used by an agency to make a decision? The leading normative theory for *Chevron* deference is that agencies have greater policy expertise than courts.³¹⁰ Courts are

The decisions of the federal courts are uniform but for the outlier of the Seventh Circuit in *Ali*, which is the only cited decision that invites courts to look outside the record of conviction to determine if a person has been convicted of a crime involving moral turpitude. By adopting this outlier as the basis of its 'uniform' approach, the Attorney General essentially guts the analysis adopted by the other federal circuits and creates the disuniformity it purportedly seeks to avoid.

Reconsideration Memo, *supra* note 58, at 13.

In addition, the AG reasoned that "moral turpitude" is never an element of a noncitizen's prior offense; while it is "simple" for a sentencing court employing the categorical approach to search for the necessary elements in the statute of conviction for the prior offense, an immigration court never will find "moral turpitude" listed in the elements of the statute. *Silva-Trevino*, 24 I&N Dec. at 700-01. However, the AG glossed over the precursor to the immigration judge conducting the categorical approach: the judge first looks to case law to determine which elements necessarily involve moral turpitude. *See* Jean-Louis, 582 F.3d at 477-78. Then the judge searches for evidence of those elements in the record of conviction if the statute is divisible. The judge never looks for the words "moral turpitude" in the elements of the offense or the record of conviction.

³⁰⁶ Cf. Richard Murphy, *The Brand X Constitution*, 2007 B.Y.U.L. REV. 1247, 1300 (2007) (citing Letter from James Madison to James Monroe, President of the United States (Dec. 27, 1817), in 3 Letters and Other Writings of James Madison 217, 221 (Philadelphia, J.B. Lippincott & Co. 1867)) ("[A] great deal of legislation does not receive serious, broad-based scrutiny from members of Congress. James Madison made this point nearly two hundred years ago, explaining that 'midnight precedents' – the result of last-minute, pell-mell rush that attends the close of legislative sessions – deserves no one's respect.").

³⁰⁷ *See* Beerman, *supra* note 300, at 956-59 (describing reasons why agencies may choose to wait until the end of the President's term to take important administrative action).

³⁰⁸ *See* Barron and Kagan, *supra* note 125, at 252.

³⁰⁹ *See* Anthony, *Interpretive Rules*, *supra* note 163, at 1374; *see also* AILF Letter, *supra* note 207; ABA Letter, *supra* note 199; ABA Resolution, *supra* note 216; NAIJ Statement, *supra* note 200; Reconsideration Memo, *supra* note 58.

³¹⁰ *See, e.g.*, Sunstein, *Chevron Step Zero*, *supra* note 3, at 197; Elhauge, *supra* note 85, at 2135. Professor Ronald J. Krotoszynski, however, argues that while *Chevron* referenced agency expertise as a "background consideration supporting a rule of deference," the result

generalists; agencies are specialists.³¹¹ “Specialists usually have a better grasp of technical terms or the practical consequences of a decision, and thus their views should be given deference by generalists.”³¹² Yet, agency decisions do not always receive such deference. As Professor Murphy has explained: “[a]n agency’s comparative interpretive advantages can only matter where an agency actually makes use of them—an interpretation that an agency bases on astrology, for instance, has little claim to anyone’s respect.”³¹³ Thus, “courts might justifiably engage in independent review where there are grounds for concluding that an agency has not done its interpretive ‘homework.’”³¹⁴ In the *Silva-Trevino* decision-making process, the AG merely putting his name on the decision cannot make up for the failure to do his “interpretive ‘homework.’”³¹⁵

Justice Scalia would have liked the *Mead* majority to base its decision on the authoritativeness of the decision-maker, yet this was the dissent, not the majority opinion.³¹⁶ The majority in *Mead* emphasized *how* the agency made its decision, not *who* made the decision.³¹⁷ Of the possible indicators for whether an agency decision has the “force of law,” the *Mead* opinion “suggest[s] that chief among them is the degree of procedural formality involved in the action.”³¹⁸ As discussed in this section, the agency’s decision-making process in *Silva-Trevino* was lacking in procedural formalities that would ensure the “fairness and deliberation that

was compelled by an implied delegation of lawmaking power to the agency. Krotoszynski, *supra* note 125, at 739.

³¹¹ See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 973 (1992).

³¹² *Id.*

³¹³ See Murphy, *Judicial Deference*, *supra* note 280, at 1052.

³¹⁴ *Id.* For example, in *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the Court refused *Chevron* deference to the BIA’s interpretation of the statutory term “persecutor of others,” which precluded a grant of asylum or withholding of removal, because the BIA had not exercised its interpretive authority, but rather relied on a case interpreting the term in an entirely different statutory context. See *id.* at 1166-67. The Court remanded to the BIA for an initial determination of the statutory term in question.

³¹⁵ See Murphy, *Judicial Deference*, *supra* note 280, at 1052.

³¹⁶ See *Mead*, 533 U.S. at 257 (Scalia, J., dissenting).

³¹⁷ See *id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”)

³¹⁸ See Barron and Kagan, *supra* note 125, at 210-11; see also Richard Murphy, *The Brand X Constitution*, *supra* note 306, at 1290 (“[A] dominant theme of *Mead* remains the Court’s effort to cabin the scope of *Chevron* deference with procedure”); Merrill, *supra* note 126, at 814 (“One factor clearly deemed relevant by the majority was whether the statute ‘provides for a relatively formal procedure.’”).

should underlie a pronouncement of such force.”³¹⁹ Had the AG used formal procedures, such procedural formality could have guarded against what amounted to an “‘authoritative’ production of unfair, inconsistent or arbitrary law.”³²⁰

IV. Proposed Solutions

This section discusses some different approaches to solve the problem unleashed by Attorney General Mukasey when he published the *Silva-Trevino* decision. Each approach, however, is not a perfect fix; the proposed solutions and problems with each solution are discussed below.

A. Courts Can Refuse Chevron Deference

The primary solution proposed in this article is for courts to refuse deference to the agency’s decision in *Silva-Trevino*. Courts can refuse deference under *Chevron* step zero; however, this requires wading through the murky waters of *Mead* and answering questions that courts may prefer to leave to law review articles.³²¹ The first circuit court to consider whether to give *Silva-Trevino* deference, the Third Circuit in 2009 in *Jean-Louis v. AG*,³²² did not consider the impact of the AG’s procedures, as this challenge was not raised by the petitioner.³²³ However, the court reasoned, “the lack of transparency, coupled with the absence of input by interested stakeholders, only serves to dissuade us further from deferring to the Attorney General’s novel approach.”³²⁴

A solution of lesser resistance is for courts to refuse to defer to *Silva-Trevino* under *Chevron* step one, by reasoning that the word “convicted” in the relevant statutes indicates a clear Congressional preference for the categorical approach.³²⁵ This was the Third Circuit’s approach in *Jean-Louis*; the court held that the Attorney General’s “novel framework for determining whether a petitioner has been convicted of a

³¹⁹ See *Mead*, 533 U.S. at 230.

³²⁰ See Bressman, *How Mead Has Muddled*, *supra* note 91, at 1449.

³²¹ See, e.g., Bressman, *How Mead Has Muddled*, *supra* note 91, at 1446 (“Because courts are insecure about *Mead*, many grant lower-level *Skidmore* deference in addition to or in lieu of *Chevron* deference. Thus, courts engage in *Mead*-induced *Chevron* avoidance.”); *cf.* Brand X, 545 U.S. at 1019 (Scalia, J., dissenting) (“It is indeed a wonderful new world that the Court creates, one full of promises for administrative-law professors in need of tenure articles and, of course, for litigators.”).

³²² 582 F.3d 462 (3d Cir. 2010).

³²³ See *Jean-Louis*, 582 F.3d at 417 n.11.

³²⁴ *Id.*

³²⁵ See Dulal-Whiteway, 501 F.3d at 125; Velazquez-Herrera, 24 I&N Dec. at 513.

crime involving moral turpitude”³²⁶ should not command *Chevron* deference because the statute was clear.³²⁷ However, there is arguably some ambiguity when considering all of the relevant removal statutes.³²⁸

If *Silva-Trevino* fails *Chevron* step zero, courts will analyze the case under the *Skidmore* factors, giving weight to the agency’s decision based on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements and any other factors that give it “power to persuade.”³²⁹ *Silva-Trevino* will likely fail *Skidmore* review, mostly because the AG’s decision was entirely inconsistent with over a

³²⁶ *Id.* at 464.

³²⁷ The Third Circuit in *Jean-Louis* decided that the Immigration and Nationality Act was clear and that the ambiguity described by Attorney General in *Silva-Trevino* was “an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA’s own rulings or the jurisprudence of courts of appeals going back for over a century.” *Id.* at 473; *see also id.* at 477 (reasoning that the AG’s division of the term “crime involving moral turpitude” into a noun and subordinate clause “distorts its intended meaning”). The court cited longstanding case law that “the term ‘convicted’ forecloses individualized inquiry in an alien’s specific conduct and does not permit examination of extra-record evidence.” *Id.* at 473-74 (citing *Velazquez-Herrera*, 24 I&N Dec. at 513). The court reasoned, “Congress prescribed a single definition of ‘convicted,’ applicable to all removable offenses,” so it was inconsistent with the statute to employ the categorical approach for removable offenses such as aggravated felonies, yet use the new approach for crimes involving moral turpitude. *Id.* at 474-75.

³²⁸ While Congress stated that only those “convicted” of a crime involving moral turpitude could be deported, the Immigration and Nationality Act renders inadmissible a noncitizen “convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of a crime involving moral turpitude.” *See* 8 U.S.C. §§ 1227(a)(2)(A)(i), (ii); § 1182(a)(2)(A)(i)(I) (emphasis added). For all of these noncitizens attempting to overcome the ground of inadmissibility for a CIMT, the statutory language includes both convictions *and* admission to the essential elements of a CIMT; this language can create enough ambiguity for courts to give *Chevron* deference to the Attorney General’s decision in *Silva-Trevino*. The *amici* argued that BIA and federal court decisions concluded that Congress intended, even when a noncitizen admits to the essential elements of a CIMT, to prevent judges from trying facts and underlying conduct. *See* Reconsideration Memo, *supra* note 58, at 26 (citing *Howes v. Tozer*, 3 F.2d 849, 852 (1st Cir. 1925); *U.S. ex rel. Castro v. Williams*, 203 F. 155, 156-67 (D. NY 1913)); *see also id.* at 22 (citing *In re Seda*, 17 I&N Dec. 550, 554 (BIA1980) and *In re Winter*, 12 I&N Dec. 638, 642 (BIA 1967, 1968)). However, the statutory term “admits” does appear to be ambiguous, unlike the term “convicted.” *Cf.* *Velazquez-Herrera*, 24 I&N Dec. at 513 (holding that “where a ground of deportability is premised on the existence of a ‘conviction’ for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.”). As such, the agency can change its mind with respect to its meaning. *See* *Brand X*, 545 U.S. at 981. That new meaning, even if it conflicts with federal circuit court precedent, may command *Chevron* deference. *See id.*

³²⁹ *See* *Skidmore*, 323 U.S. at 140.

century of immigration case law.³³⁰ Also, the AG's decision does not demonstrate "thoroughness evident in its consideration," as there were many errors of law in the decision.³³¹ Thus, the likely result of *Skidmore* review will be a return to the status quo.

Should there be a harder look at the use of the categorical approach in immigration cases? The Supreme Court recently held that "the statute [INA] foresees the use of fundamentally fair procedures...But we do not agree that fairness requires the evidentiary limitations [of the categorical approach]."³³² Some courts have questioned the approach as unduly formulaic, as the categorical approach requires the immigration judge to put on blinders as to what "really happened."³³³ There are many prudential reasons to apply the categorical approach, above all because it spares immigration judges a retrial of the criminal case.³³⁴ However, the agency may wish to reconsider whether efficiency trumps all in the criminal removal context. For these reasons, perhaps the solution of courts refusing *Chevron* deference to the Attorney General's decision is not the only answer.

B. *The Agency Can Start Over, Ensuring More Process*

The agency can have a say in the overhaul of the categorical approach and still command *Chevron* deference by reconsidering the issue through the use of procedures that ensure more public input. One option is for the agency to commence notice-and-comment rulemaking on the new moral turpitude test.³³⁵ Another option is for the agency to *sua sponte*

³³⁰ See *id.*; Mylius, 201 F. at 863.

³³¹ See *Skidmore*, 323 U.S. at 140; see also notes 204, 305, *supra*.

³³² See *Nijhawan*, 129 S. Ct. at 2303 (2009); see also *In re Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (holding that the Due Process clause of the Fifth Amendment requires removal proceedings to be fundamentally fair).

³³³ See, e.g., *Montero-Ubri v. INS*, 229 F.3d 319, 321 (1st Cir. 2000) ("The push in the law toward categorical approaches to classifying crimes as either involving moral turpitude or not is largely based on the policy of not retrying prior criminal convictions in later deportation hearings. No such interest is served by precluding consideration of basic facts stated on the official court records of the charging and conviction documents. The categorical approach does not require that blinders be worn."); see also *U.S. v. Miller*, 478 F.3d 48, 52 (1st Cir. 2007) (reasoning, in the sentencing context, that the "*Taylor* analysis is categorical, but an inquiring court has the right to draw reasonable inferences from the evidence... The court is not required either to wear blinders or to leave common sense out of the equation.").

³³⁴ See, e.g., NAIJ Statement, *supra* note 200.

³³⁵ See AILF Letter, *supra* note 207; ABA Letter, *supra* note 199.

reconsider *Silva-Trevino*,³³⁶ this time inviting briefing from interested parties.³³⁷

The rulemaking option was the solution that Attorney General Holder used when vacating *In re Compean* (“*Compean I*”),³³⁸ a January 7, 2009, decision by the outgoing AG Mukasey. In *Compean I*, AG Mukasey had decided that there was no right to effective assistance of counsel in removal cases; he reversed years of immigration precedent decisions that allowed noncitizens to reopen their cases based on ineffective assistance of counsel.³³⁹ In *Compean I*, however, AG Mukasey invited *amicus* briefing before his decision was final, thus guaranteeing input from the public on the drastic change in law.³⁴⁰ When there was significant public backlash against the decision, AG Holder vacated the opinion in June 2009.³⁴¹ In *Compean II*, AG Holder stated: “I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice...”³⁴² AG Holder decided to commence notice-and-comment rulemaking on the issue of ineffective assistance of counsel in removal proceedings.³⁴³ AG Holder can respond to the *Silva-Trevino* case with a similar tactic, by vacating the opinion and proposing regulations.

There are several reasons why AG Holder may choose not to address *Silva-Trevino* in the same way as *Compean I*. For one, the right to effective assistance of counsel in removal proceedings is a more politically safe battle to fight. Noncitizens who have fallen prey to bad attorneys are perceived as victims; noncitizens who have been convicted of crimes rarely are viewed as victims.³⁴⁴ The right to effective assistance of counsel is a more straightforward issue than the categorical approach; thus the public may not understand the impact of *Silva-Trevino*.³⁴⁵ AG Holder also may not want the publicity of overruling *Silva-Trevino*, which can be viewed as

³³⁶ See 8 C.F.R. § 1003.2(a).

³³⁷ See Reconsideration Memo, *supra* note 58, at 7.

³³⁸ See 24 I&N Dec. 710 (A.G. 2009).

³³⁹ *Compean I*, 24 I&N Dec. at 712-13.

³⁴⁰ See *id.* at 713-14.

³⁴¹ *In re Compean*, 25 I&N Dec. 1 (A.G. 2009) (“*Compean II*”).

³⁴² *Id.* at 2.

³⁴³ *Id.*

³⁴⁴ See generally ICE, “Criminal Alien Program,” available at <http://www.ice.gov/partners/dro/cap.htm> (“The Criminal Alien Program (CAP) focuses on identifying criminal aliens who are incarcerated within federal, state and local facilities thereby ensuring that they are not released into the community by securing a final order of removal prior to the termination of their sentence.”).

³⁴⁵ Cf. Nijhawan, 129 S. Ct. at 2299 (reasoning that “the categorical method is not always easy to apply”).

a triumph of common sense (deport the child molester when a judge knows those were the facts) over creative lawyering (because the record of conviction does not show those facts, the child molester avoids deportation). Finally, as notice-and-comment rulemaking is costly to the agency,³⁴⁶ AG Holder may not wish to spend the agency's time on the new moral turpitude test, especially because the agency currently is in the process of writing regulations on the issue of ineffective assistance of counsel in removal proceedings.

Should the agency commence notice-and-comment rulemaking on the categorical approach, there is no guarantee that the end product will be any different than the AG's decision in *Silva-Trevino*. Scholars are skeptical of the notice-and-comment rulemaking process for its fanfare at the expense of real deliberation.³⁴⁷ Professor Donald Elliott has stated,

No administration in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions – a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.³⁴⁸

A cheaper, more efficient option is for AG Holder to reconsider *Silva-Trevino*, inviting interested parties to brief issues. This technique has been used by the BIA and AGs in the past when the agency was considering a major change in policy through adjudication.³⁴⁹ As with rulemaking,

³⁴⁶ See Stephenson, *supra* note 93, at 546; Magill, *supra* note 91, at 1397.

³⁴⁷ See Barron and Kagan, *supra* note 125, at 231-32; see also *id.* at 232 (“[N]otice-and-comment rulemaking today tends to promote a conception of the regulatory process as a forum for competition among interest groups, rather than a means to further the public interest.”).

³⁴⁸ Elliott, *Re-inventing Rulemaking*, *supra* note 136, at 1492-93. Often, the venues in which the discussion takes place are informal conversations between agency staff and interested parties outside the agency, which allow for crucial input by the public before the agency publishes the notice of proposed rulemaking. Brian Galle and Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L. J. 1933, 1956-60 (2008) (discussing transparency in agency rulemaking, which occurs during the rule development, and stating, “[b]y the time an agency issues a [notice of proposed rulemaking], it has already invested much time and effort in developing the proposed rule and often does not change it in fundamental ways in response to comments.”).

³⁴⁹ See, e.g., *Compean I*, 24 I&N Dec. at 713-14 (noting AG's invitation to interested groups to brief changes to ineffective assistance of counsel policy); *Reconsideration Memo*, *supra* note 58, at 8-9 (citing *In re Soriano*, 21 I&N Dec. 516) (discussing Attorney General Reno's invitation for briefing from interested parties on the retroactivity of

immigration advocates and judges would have an opportunity for input and thus could detail the benefits of using the categorical approach in removal proceedings.³⁵⁰ However, there is no guarantee that the agency will take the side of immigrants' rights advocates (and immigration judges) and maintain the categorical approach. Nonetheless, ensuring more process – either through rulemaking or adjudication with invitation for briefing – allows the agency to think about this major overhaul to the law before imposing it on affected parties.³⁵¹ If the agency cannot give a reasoned response to a concern raised by commentators, a court can later reject the agency's interpretation as arbitrary and capricious.³⁵²

Attorney General Holder may avoid any reconsideration of *Silva-Trevino*, perceiving that courts will not defer to the decision, as courts may interpret the word “conviction” to clearly indicate a Congressional preference for the categorical approach.³⁵³ Or, the AG may simply wait to see what courts will do with the decision.³⁵⁴ However, “one year and half after the issuance of *Silva-Trevino* – and thousands of petitions for review

changes to relief under former 8 U.S.C. § 1182(c) and noting that the decision addresses the points raised in the *amicus* briefs); *see also* Wyman-Gordon, 394 U.S. at 762-63 (quoting *Excelsior Underwear*, 156 N.L.R.B. at 1238) (discussing how the NLRB had “invited certain interested parties” to file briefs and participate in oral arguments prior to its ruling in *Excelsior Underwear, Inc.*, which set forth a new policy requiring employers to provide unions with lists of names of employees before elections).

³⁵⁰ *See, e.g.*, ABA Resolution, *supra* note 216; NAIJ Statement, *supra* note 200.

³⁵¹ *See* Bressman, *Procedures as Politics*, *supra* note 148, at 1781; Anthony, *Interpretive Rules*, *supra* note 163, at 1373.

³⁵² *See, e.g.*, *State Farm*, 463 U.S. at 43; *Overton Park*, 401 U.S. at 419-20. Scholars argue that the best way for an agency to anticipate potential problems with its decision is to open up the process to challengers before the decision is final; formal procedures facilitate this crucial input from the public. *See* Bressman, *Procedures as Politics*, *supra* note 148, at 1781.

³⁵³ *See, e.g.*, *Dulal-Whiteway*, 501 F.3d at 125; *Velazquez-Herrera*, 24 I&N Dec. at 513; *but see* note 328, *supra* (discussing ambiguity of the INA).

³⁵⁴ Only one circuit court, the Third Circuit, has reviewed the Attorney General's decision in *Silva-Trevino* and explicitly rejected the new test for determining whether an offense involves moral turpitude. *See* *Jean-Louis*, 582 F.3d at 478-80. The Eighth Circuit recently held, without significant discussion, that it refused to apply *Silva-Trevino* because it conflicted with the court's precedent. *See* *Guardado-Garcia*, 2010 U.S. App. LEXIS at *5-6. The Ninth Circuit declined to consider a challenge to the retroactive application of the *Silva-Trevino* framework; the court remanded the case because the petitioner's hearing did not comport with due process. *See* *Castruita-Gomez*, 2010 U.S. App. LEXIS 18612 at *3-4. The Ninth Circuit also is considering another challenge to the *Silva-Trevino* framework; in both Ninth Circuit cases, immigrants' rights organizations filed *amicus* briefs highlighting the various problems with the AG's decision. *See* *Castruita-Gomez Amicus Brief*, *supra* note 70; *Zamudio-Ramirez Amicus Brief*, *supra* note 70.

later – no circuit court has endorsed its radical framework.”³⁵⁵ Courts may be signaling to the agency that its failure to employ procedures that ensure public input means they have little faith in the *Silva-Trevino* decision.³⁵⁶

V. Conclusion

Attorney General Mukasey, in his last-minute decision in *Silva-Trevino*, created a drastic change in immigration law by overhauling the categorical approach, which had been used by immigration judges for over a century to determine whether a noncitizen had been convicted of a CIMT. The AG made such a change through a process that allowed no input from parties affected by the change, including the individual whose case became the new precedent. Courts examining this last minute overhaul should find that these procedures guaranteed neither transparency nor careful consideration, which are essential elements of lawmaking. For this reason, courts should refuse deference at *Chevron* step zero, pursuant to the Supreme Court’s decision in *Mead*. An additional way to cure the procedural defects in the *Silva-Trevino* decision-making process is for AG Holder to reconsider the decision through either the notice-and-comment rulemaking process or allowing interested parties to brief the issues; either choice by the agency would allow public input on this significant change in immigration law.

As AG Holder stated during his confirmation hearings, “I firmly believe that transparency is a key to good government. Openness allows the public to have faith that its government obeys the laws. Public scrutiny also provides an important check against unpersuasive legal reasoning – reasoning that is biased toward a particular conclusion.”³⁵⁷ The Attorney General should keep his promise, ensuring transparency and careful consideration in agency action – elements noticeably missing from his predecessor’s decision in *Silva-Trevino*.

³⁵⁵ Castruita-Gomez *Amicus* Brief, *supra* note 70, at 15-17 (discussing cases in which circuit courts have applied the traditional categorical approach notwithstanding the *Silva-Trevino* decision).

³⁵⁶ See Jean-Louis, 582 F.3d at 471 n.11 (“[T]he lack of transparency, coupled with the absence of input by interested stakeholders, only serves to dissuade us further from deferring to the Attorney General’s novel approach.”).

³⁵⁷ AILF Letter, *supra* note 207, at 3 (quoting Confirmation Hearings for AG Eric H. Holder, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldToHolder.pdf> (Question and Answer 2) (responding to question from Senator Feingold that addressed problems of “secret law” under the Bush administration)).